No. 75-1704

In the Supreme Court of the United States

OCTOBER TERM, 1975

MARTIN R. HOFFMANN, SECRETARY OF THE ARMY,

v.

LOUIS J. FIOTO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT

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JURISDICTIONAL STATEMENT

OPINION BELOW

The opinion of the district court (App. A, *infra*), as amended (App. B, *infra*), is not yet reported.

JURISDICTION

The judgment of the three-judge district court, holding unconstitutional and in effect enjoining enforcement of 10 U.S.C. 1331(c) as it applies to the named appellee and the class he represents, was entered on January 26, 1976 (App. C, *infra*). A notice

of appeal to this Court was filed on February 25, 1976 (App. D, *infra*). On April 19, 1976, Mr. Justice Marshall extended the time for docketing the appeal to and including May 25, 1976. The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

QUESTIONS PRESENTED

1. Whether Congress, when it established in 1948 a program of retirement pay for nonregular military service, acted unconstitutionally in excluding from eligibility for such retirement pay individuals who had served 20 years in nonregular military service since August 16, 1945, but who had been members of the National Guard or the Reserve prior to August 16, 1945, and had failed to serve on active duty during either World War.

2. Whether, in any event, the district court had authority to enter a judgment against the Secretary of the Army for retired pay retroactive to the date of retirement. (This question is discussed *infra*, at p. 12, n. 11.)

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution in pertinent part provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law.

10 U.S.C. 1331 provides in pertinent part:

> (a) Except as provided in subsection (c), a person is entitled, upon application, to retired pay computed under section 1401 of this title, if—
>
> (1) he is at least 60 years of age;
>
> (2) he has performed at least 20 years of service computed under section 1332 of this title;
>
> (3) he performed the last eight years of qualifying service while a member of any category named in section 1332(a)(1) of this title, but not while a member of a regular component, the Fleet Reserve, or the Fleet Marine Corps Reserve; and
>
> (4) he is not entitled, under any other provision of law, to retired pay from an armed force or retainer pay as a member of the Fleet Reserve or the Fleet Marine Corps Reserve.
>
> * * * * *
>
> (c) No person who, before August 16, 1945, was a Reserve of an armed force, or a member of the Army without component or other category covered by section 1332(a)(1) of this title except a regular component, is eligible for retired pay under this chapter, unless he performed active duty after April 5, 1917, and before November 12, 1918, or after September 8, 1940, and before January 1, 1947, or unless he performed active duty (other than for training) after June 26, 1950, and before July 28, 1953.

STATEMENT

The Army and Air Force Vitalization and Retirement Equalization Act of 1948, 62 Stat. 1081, as amended, 10 U.S.C. 1331 *et seq.*, established retired pay for reservists and national guardsmen who meet

certain age and service requirements. In general, individuals who have reached the age of sixty and have accumulated twenty years of eligible service are entitled to retired pay under the Act. 10 U.S.C. 1331 (a). However, 10 U.S.C. (1952 ed., Supp. IV) 1331 (c) excluded from eligibility any person "who, before August 16, 1945, was a Reserve of an armed force, or a member of the Army without component or other category covered by section 1332(a)(1) of this title except a regular component * * *unless he performed active duty after April 5, 1917, and before November 12, 1918, or after September 8, 1940, and before January 1, 1947." 70A Stat. 102; see 62 Stat. 1087-1088.

Thus, the Act excluded from eligibility for retired pay individuals who had been members of the non-regular military service (*i.e.*, Army Reserve, Army National Guard, etc.) prior to August 16, 1945, but had failed to serve on active duty during either World War. The Act was subsequently amended to remove the eligibility bar for such individuals if they had later served on active duty during the Korean War. 72 Stat. 702, 10 U.S.C. 1331(c).

The named appellee, Louis J. Fioto, served in the United States Army National Guard for seven years prior to 1945 (from 1933 to 1940), but he did not serve on active duty during either World War.[1] Fioto

[1] The opinion of the district court states that Fioto's failure to serve in World War II was "[d]ue to injuries resulting from an automobile accident in 1941 * * *" (App. A, *infra*, p. 2a). There is, however, no support for this statement in the record. Furthermore, Fioto's Army personnel record,

rejoined the National Guard after the end of World War II and served for slightly more than twenty years, until 1967, but he did not serve on active duty during the Korean War.

Fioto applied to the Department of the Army for retired pay benefits in 1967 and again in 1974, but on both occasions his application was denied on the basis of 10 U.S.C. 1331(c). After the second denial, Fioto commenced this action in the United States District Court for the Eastern District of New York, on behalf of himself and others similarly situated, seeking injunctive relief and a money judgment for retired pay retroactive to the date of his retirement, on the ground that the eligibility bar of 10 U.S.C. 1331(c) denies due process. The action was certified as a class action pursuant to Rule 23, Fed. R. Civ. P.,[2] and a three-judge court was convened under 28 U.S.C. 2282.

which was not introduced in evidence but relevant parts of which we have lodged with the Clerk of the Court, shows that when Fioto re-enlisted in the National Guard in 1947, and periodically thereafter, he attested, subject to the sanctions imposed by 18 U.S.C. 1001, that he had never been rejected for military service for medical reasons and had never been hospitalized (except in 1949) as a result of an accident. Moreover, an alleged automobile accident in 1941 would not explain Fioto's withdrawal from the National Guard in 1940.

[2] The class was defined as (App. B, *infra*, p. 9a):

> [A]ll "persons at least 60 years of age who have performed 20 years of service computed under 10 U.S.C. § 1332 since August 16, 1945 and otherwise are entitled to retired pay for non-regular military service, except that before August 16, 1945 they were a Reserve of an

On cross-motions for summary judgment, the district court held that, as applied to Fioto and the class he represents, 10 U.S.C. 1331(c) violates the requirements of equal protection inherent in the Due Process Clause of the Fifth Amendment (App. A, *infra*, p. 5a). The court reasoned that the statutory eligibility bar "bears no rational relationship to the legislative objectives which led to the [Act]" (App. A, *infra*, p. 5a).[3]

The court ordered that Fioto "henceforth be placed on the Army's retirement rolls" (App. C, *infra*, p. 12a) and be paid "all retirement benefits which have accrued since his honorable discharge which have been denied him under the Army's erroneous ruling * * *" (App. C, *infra*, p. 12a). The court further ordered the Secretary to place all members of the class on the Army's retirement rolls and to grant them retirement benefits (App. C, *infra*, p. 12a).[4]

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armed force or a member of the Army without component and did not perform active duty after April 15, 1917 but before November 12, 1918, or after September 8, 1940 and before January 1, 1947, or after June 26, 1950 but before July 28, 1953, and therefore were disqualified from Retired Pay Benefits by virtue of 10 U.S.C. § 1331(c)."

[3] The court determined that Congress' purpose in establishing a program of retired pay for nonregular military service was to create "an incentive to continued service" and thereby "to limit the anticipated post-war exodus from the Reserves and National Guard" (App. A, *infra*, p. 6a).

[4] Appellee Fioto is currently being paid under the court's order, but the court has stayed its order with respect to the class.

THE QUESTION IS SUBSTANTIAL

This appeal presents an important question concerning the extent of Congress' constitutional power to allocate military retirement pay.[5] In holding that Congress lacked power to exclude from eligibility for such pay individuals who had served 20 years in nonregular military service since August 16, 1945, but who had been members of the National Guard or the Reserve prior to August 16, 1945, and had failed to serve on active duty during wartime, the court seriously misapplied the Due Process Clause.

Congress' principal purpose in establishing retired pay for nonregular military personnel was to maintain and enhance the Nation's combat readiness by inducing new recruits to enlist in the National Guard and Reserve after World War II, and by providing an incentive for such recruits to serve a full twenty years. See S. Rep. No. 1543, 80th Cong., 2d Sess. 9 (1948); Hearings on H.R. 2744 before the Senate Committee on Armed Services, 80th Cong., 2d Sess. 29 (1948). In addition, Congress wished to show the Nation's gratitude to those reservists and guards-

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[5] Although the district court's order is addressed to the Secretary of the Army, the holding of unconstitutionality affects the other military branches as well. The Department of the Army estimates that the cost of providing retired pay to former members of the Army National Guard and Air National Guard affected by this case would be $10.8 million. Estimates are not available with respect to the cost of paying such benefits to similarly situated former members of the Army, Air Force, or Navy Reserve. In addition, the court's order would require substantial expenditures just to identify and locate members of the affected class.

men who had served on active duty during wartime, and its need of their continued services, by providing them with retired pay upon completion of satisfactory service. See Hearings on H.R. 2744, *supra*, at 29.[6]

But there was no basis for any similar show of gratitude to, or of need for the continued services of, those individuals, such as appellee Fioto, who had been in the nonregular military service before or during wartime and had failed to come to the Nation's defense in its time of need. Moreover, since those individuals in the past had not fulfilled the purpose for which a militia or other nonregular military service is maintained, Congress understandably saw no reason to encourage their continued or renewed participation in such service. As Major General John E. Dahlquist, the Deputy Chief of Personnel and Administration of the Army Chief of Staff, advised the Senate Committee on Armed Services (*ibid.*):

> The purpose of reservists was to fight in the war. If he did not fight in the wars we did have, we feel he should not qualify.[7]

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[6] This rationale was further reflected in the 1958 amendment that added service on active duty during the Korean War to the exceptions to the eligibility bar for individuals who had been members of the National Guard or Reserve prior to August 16, 1945. See, *e.g.*, S. Rep. No. 2188, 85th Cong., 2d Sess. 1 (1958).

[7] General Dahlquist outlined the reasons for establishing retired pay for nonregular military service as follows (*ibid.*):

> Our first objective is an incentive for the future.
>
> However, we face this practical situation that we have thousands of men who were responsible for the fact that we were in a position to have a Reserve unit without which we could not have mobilized so that part of the incentive to the future is to show that this Nation at least is grateful to all those men who did something in the past.
>
> The purpose of reservists was to fight in the war. If he did not fight in the wars we did have, we feel he should not qualify.

In thus distinguishing, for purposes of eligibility for retired pay for further service, between individuals who had served on active duty during wartime and those who had not, Congress was making virtually the same distinction that this Court sustained as rational in *Johnson* v. *Robison*, 415 U.S. 361. In *Robison*, Congress had distinguished between military service and alternative civilian service for purposes of eligibility for educational benefits. In upholding this distinction, the Court noted (*id.* at 379):

> * * * [T]he disruptions suffered by military veterans and alternative service performers are qualitatively different. Military veterans suffer a far greater loss of personal freedom during their service careers. Uprooted from civilian life, the military veteran becomes part of the military establishment, subject to its discipline and potentially hazardous duty.

Precisely the same is true of the difference between a reservist or guardsman who was activated into wartime duty and one who, like Fioto, was not.

The distinction between older individuals, such as

Fioto, who had served in the militia prior to 1945, and new recruits also was rational. Congress' overriding purpose in enacting the 1948 Act was to preserve the militia as an effective secondary fighting force that would be available for immediate activation in time of military need. To do this, it was necessary to make the militia attractive to the newer generation of men who had been too young to serve during World War II.

Older individuals like Fioto, who had never seen active wartime duty, were reasonably regarded as being potentially less useful as soldiers in the event of wartime activation. Fioto and the other members of the class he represents offered neither the youth nor the experience Congress presumably sought in post-war militiamen. Accordingly, Congress rationally chose not to furnish them with a retirement-pay incentive for re-enlistment.[8]

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[8] While Congress did not exclude from eligibility for retired pay other older individuals who had not fought in World War II, that fact does not render the classification invalid as to former militiamen who already had once failed to assist the militia in carrying out its basic purpose. Congress could properly consider that history in distinguishing between such former militiamen and other potential recruits. Cf. *Marshall* v. *United States*, 414 U.S. 417. Moreover, in view of the 20 year service requirement (10 U.S.C. 1331(a)(2)) and the provisions for a mandatory retirement age (*e.g.*, 32 U.S.C. 313; National Guard Reg. 600-200, ¶ 2-6(b)(4); see 10 U.S.C. 1331(a)(1)), Congress could reasonably believe that there would be relatively few older individuals who had no pre-1945 nonregular military service (and who had not been affected by the general mobilization during World War II), who could achieve eligibility for retired pay by first enlisting in the militia after 1945.

In short, Congress had no reason to reward members of the appellee class or to encourage their renewed or continued enlistment in the nonregular military service, and for that reason Congress deliberately chose to deny them any such reward or encouragement.[9] Congress correctly believed that that classification was consistent with its objective of establishing and maintaining a peacetime reserve of soldiers willing and able to serve in time of war.[10]

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[9] The district court concluded that Congress had not intended to bar members of the appellee class from eligibility, apparently basing its conclusion upon the statement in Senate hearings by an administration witness that a member of the nonregular military service "would get credit for the points [accumulated during years in which he recieved insufficient points to obtain a full year of credit] if he ultimately got twenty years of service" (App. A, *infra*, p. 7a, quoting from Hearings on H.R. 2744, *supra*, at 70). But that statement was made, as Senator Tydings explicitly noted, on the assumption that the hypothetical reservist or guardsman in question had "served 20 years and served in World War I or II." Hearings on H.R. 2744, *supra*, at 70.

[10] In the district court, appellee Fioto asserted that he had been "found medically unqualified when he attempted to enlist in World War II" (Fioto Br. 10, note), and therefore, implicitly, that his failure to serve had not been due to any unwillingness on his part. There is reason to doubt the correctness of his assertion. See note 1, *supra*. But even if Fioto had been physically unable to serve during the war, and therefore individually fell outside the statutory rationale, that would not render the statute's application to him invalid. A classification "does not offend the Constitution simply because [it] 'is not made with mathematical nicety * * *.'" *Dandridge* v. *Williams*, 397 U.S. 471, 485. Nor can Fioto claim that the operation of the statute is unduly harsh, since

For these reasons, we submit that the exclusion of the appellee class from eligibility for retired pay was rational and should be sustained as constitutional.[11]

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he may be presumed to have known as early as 1948, long before he reached retirement age, that he would be ineligible for retired pay, and he need not have reenlisted thereafter.

[11] But if this Court held to the contrary, it would be appropriate for it to vacate the judgment of the district court and remand the case for reconsideration, in light of the intervening decision in *United States* v. *Testan*, No. 74-753, decided March 2, 1976, of the propriety of the award of retired pay retroactive to the date of retirement. That award in essence constituted a money judgment that was beyond the jurisdiction of the district court to enter in a suit brought against the Secretary. The district courts have power to award monetary relief against the government only to the extent that jurisdiction is conferred over actions against the United States by the Tucker Act, 28 U.S.C. 1346. Moreover, even if the district court would have jurisdiction over an action in which the United States had been joined as a party defendant, there is substantial doubt whether the complaint asserted a claim as to which sovereign immunity had been waived. As this Court had occasion to note in *United States* v. *Testan*, *supra*, slip op. at 6:

> The Tucker Act, of course, is itself only a jurisdictional statute; it does not create any substantive right enforceable against the United States for money damages.

No Act of Congress created a substantive right in the appellee class to retroactive retired pay; to the contrary, the appellees' objection is that the statute explicitly denies them such pay. In short, insofar as the appellees sought retroactive pay, their suit was one to which the United States had not consented. See *United States* v. *Sherwood*, 312 U.S. 584. Cf. *Edelman* v. *Jordan*, 415 U.S. 651.

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted.

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MAY 1976.

APPENDIX A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 75 C 44

LOUIS J. FIOTO, on behalf of himself and all other persons, similarly situated, PLAINTIFFS

—against—

UNITED STATES DEPARTMENT OF THE ARMY, HOWARD CALLAWAY, as Secretary of the Army, DEFENDANTS

OPINION

Before: LUMBARD, Circuit Judge, and BRUCHHAUSEN and BRAMWELL, District Judges.

LUMBARD, Circuit Judge:

Louis J. Fioto, on behalf of himself and all others similarly situated,[1] challenges the constitutionality of 10 U.S.C. § 1331(c) which, in combination with § 1331(a), governs the availability of retirement pay for members of the non-regular military service (i.e., Reserves and National Guard). Pursuant to 28 U.S.C. §§ 2282, 2284 this court was convened to consider plaintiff's non-frivolous claim.

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[1] Judge Bruchhausen, as the convening judge, entered an order on January 12, 1976, certifying plaintiff's action as a class action under the provisions of Rule 23(b)(2), Federal Rules of Civil Procedure.

The facts are undisputed and the parties[2] have filed cross-motions for summary judgment. Fioto served in the Army National Guard for a total of twenty-seven years: from 1933 to 1940 and then again, for over twenty years, from 1947 until he was honorably discharged on December 9, 1967, having reached the mandatory retirement age of sixty.[3] Due to injuries resulting from an automobile accident in 1941 he did not, however, serve during World War II. Nor did he participate in the Korean War since his unit was never called to active duty.

In anticipation of his retirement, plaintiff filed an application for retirement pay with the Department of the Army on September 5, 1967. Fioto maintains, and the Army does not deny, that he satisfied each of the requirements set forth in § 1331(a): (1) he was sixty years old at the time of retirement; (2) he had completed twenty years of satisfactory service as defined in § 1332; and (3) he was not entitled to retirement pay from the armed forces under any

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[2] Plaintiff's complaint named both the Secretary of the Army and the United States Department of the Army as party defendants. The Department of the Army is not an administrative entity which Congress has authorized to be sued *eo nomine* and thus enjoys sovereign immunity from suit. *Keifer & Keifer* v. *Reconstruction Finance Co.*, 306 U.S. 381, 390 (1939). Throughout the remainder of this opinion, the term defendant will refer exclusively to the Secretary of the Army, acting in his official capacity.

[3] Fioto also served in the United States Coast Guard from 1927 to 1931. That service, however, has no bearing on his entitlement to retirement pay under the provisions of 10 U.S.C. § 1331 *et seq.*

other provision of law. Nonetheless, the Army denied his application on the ground that he failed to satisfy the proviso contained in § 1331(c), which states that any person who served in the National Guard prior to August 16, 1945, is ineligible for retirement pay unless he performed active duty during World War I, World War II, or the Korean War.[4]

Claiming that § 1331(c) was never intended to disqualify an individual who had served a complete term of twenty years following 1947, plaintiff renewed his application on February 21, 1974. This second effort was rejected as well by the Army on the basis of Fioto's pre-1945 service. Appeal to the Army Board for Correction of Military Records in June 1974 proved unavailing and no administrative remedies remain to be exhausted. At the time that plaintiff's complaint was filed in January 1975, his accrued benefits totalled slightly less than $8,000.

Defendant concedes that the mandamus statute, 28 U.S.C. § 1361, provides this court with a jurisdictional basis for granting Fioto the relief which he

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[4] Section 1331(c) provides:

> No person who, before August 16, 1945, was a Reserve of an armed force, or a member of the Army without component or other category covered by section 1332 (a) (1) of this title except a regular component, is eligible for retired pay under this chapter, unless he performed active duty after April 5, 1917, and before November 12, 1918, or after September 8, 1940, and before January 1, 1947, or unless he performed active duty (other than for training) after June 26, 1950 and before July 28, 1953.

requests. See *National Treasury Employees Union* v. *Nixon*, 492 F.2d 587, 602-603 (D.C. Cir. 1974). But relying principally on *Carter* v. *Seamans*, 411 F.2d 767 (5th Cir. 1969), *cert. denied*, 397 U.S. 941 (1970), the Army suggests that it is inappropriate for this court to grant mandamus as the plaintiff has an "adequate" remedy by bringing suit in the Court of Claims.

While it is true that mandamus is controlled by equitable principles, although technically a legal writ, *Whitehouse* v. *Illinois Central R. Co.*, 349 U.S. 366, 373 (1955), we disagree with the defendant that equity requires dismissal of the plaintiff's complaint. First, it is far from certain that Fioto's remedy in the Court of Claims would be as "adequate" as the Army asserts. In *Lee* v. *Thorton*, 420 U.S. 139 (1975), the Supreme Court held that the Tucker Act, 28 U.S.C. 1346, did not empower a district court to enjoin the operation of an unconstitutional act of Congress, even if incident to an adjudication of a claim for money damages. There is no reason to believe that the concurrent jurisdiction of the Court of Claims under 28 U.S.C. § 1491 is any broader. See *United States* v. *Sherwood*, 312 U.S. 584, 590-91 (1941). This is especially so since the Tucker Act does not confer general equitable powers upon the Court of Claims. *United States* v. *King*, 395 U.S. 1 (1969). Congress, in a 1972 amendment to 28 U.S.C. 1491, did authorize the Court of Claims, "as an incident of and collateral to any [money] judgment," to "issue orders directing . . . placement in appropriate

duty or retirement status." However, Congress has not, at least explicitly, conferred upon the Court of Claims the authority to void an unconstitutional statute. *Carter* v. *Seamans*, *supra*, did not involve such a request for relief.

Second, and more importantly, Fioto has already encountered nine years of unjustifiable delay in securing the retirement pay to which we today hold he was clearly entitled. Under these circumstances, it would be a manifest inquity to send him to another court to suffer another, inevitable period of delay.

It is agreed that if plaintiff's service in the National Guard had been limited to the years 1947 to 1967, he would now be receiving retirement pay. The Army, however, insists that Fioto's earlier service from 1933 to 1940 bars him from all benefits under the "express statutory language" of § 1331(c). *Mayer* v. *United States*, 201 Ct.Cl. 105, 112 (1973). Thus, in effect if not in intent, Fioto is being penalized for having devoted seven additional years to the service of his country. This result bears no rational relationship to the legislative objectives which led to the enactment of Title III of the Army and Air Force Vitalization and Retirement Equalization Act of 1948. Accordingly, we hold that as applied to plaintiff and the other members of his class, § 1331(c) violates the minimum requirements imposed by the Equal Protection Clause.[5] *E.g.*, *Johnson* v. *Robison*, 415

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[5] As a suit against a federal officer, this action must, of course, rely on the Fifth Amendment's Due Process Clause. But, "if a classification would be invalid under the Equal

U.S. at 374; *Department of Agriculture* v. *Moreno*, 413 U.S. 528 (1973).

A review of the legislative history of Title III plainly reveals that Congress hoped to limit the anticipated post-war exodus from the Reserves and National Guard by providing retirement pay to those who had satisfactorily served for twenty years, thus creating an incentive to continued service. See generally, U.S. Code Congressional Service, 1948, Vol. 2, p. 2161. Yet, as defendant has construed § 1331(c) it creates a disincentive to the one group whose service would have been most valuable in 1948—those with previous experience gained in the years prior to World War II.

The Army correctly points out that the Senate was concerned with the potential cost of the program as initially drafted in the House. But that concern did not, as the Army contends, lead Congress to create a purely arbitrary distinction between those who had served pre-1945 and those who had not. Rather, at the Senate's insistence, Congress adopted the reasonable requirement that an individual serve twenty "satisfactory" years, as measured by an objective standard.[6] Since it was impossible retroactively to

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Protection Clause of the Fourteenth Amendment, it is also inconsistent with the due process requirement of the Fifth Amendment." *Johnson* v. *Robison*, 415 U.S. 361, 364 n.4 (1975); *Bolling* v. *Sharpe*, 347 U.S. 497 (1954).

[6] The objective standard chosen by Congress is set forth in 10 U.S.C. § 1332. In order to qualify for retirement pay, a Reservist or National Guardsman must complete twenty years of service, in each of which he has amassed at least 50 credit

grade the quality of the services rendered prior to World War II, Congress sought to discount those years in determining whether a National Guardsman or Reservist had reached the requisite twenty-year total. An understandable exception was provided for those who had seen active duty during one of the world wars.

Pre-1940 service was thus made a nullity for the purposes of retirement pay. There is simply no evidence in the legislative history that Congress intended that any pre-1940 service would create a perpetual bar to future benefits. Indeed, testimony at the Senate hearings made plain that by remaining in the National Guard an individual could achieve his twenty year total despite the presence of some years in which he failed to meet the 50 point requirement. "He would get credit for the points if he ultimately got twenty years of service." Hearings before Committee of Armed Services, U.S. Senate, 80th Cong. 2d Sess. June 8, 1948 at p. 70. There is no dispute that plaintiff has served his twenty satisfactory years commencing with 1947.

As the government admitted during oral argument, the most reasonable assumption in the instant case is that Congress simply never anticipated a situation such as Fioto's. We need not and should

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points. Points are awarded on the following basis: fifteen points a year for membership in the Reserves or National Guard and one point for each day of active duty, annual training, attendance at a prescribed course of instruction or attendance at drills. 10 U.S.C. § 1332(a)(2).

not defer to the Army's construction of § 1331(c) when that construction is at odds with Congress' clear purposes and goals in enacting the statutory scheme of which § 1331(c) is just a part.

We therefore grant Fioto's motion for summary judgment, direct that he henceforth be placed on the Army's retirement rolls, and order that he immediately receive any and all retirement benefits which have accrued since his honorable discharge and which have been unlawfully denied him as a result of the Army's erroneous ruling. We also direct the Secretary to place all others in Fioto's class on the Army's retirement rolls and grant them retirement benefits accordingly. The defendant's cross-motion for summary judgment is correspondingly denied.

So ordered.

Dated: New York, N.Y. January —, 1976.

J. EDWARD LUMBARD
United States Circuit Judge

/s/ Walter Bruchhausen
WALTER BRUCHHAUSEN
United States District Judge

HENRY BRAMWELL
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 75 C 44

[Filed Jan. 26, 1976, U.S. District Court, E.D.N.Y.]

LOUIS J. FIOTO, on behalf of himself and all other persons, similarly situated, PLAINTIFFS

—against—

UNITED STATES DEPARTMENT OF THE ARMY, HOWARD CALLAWAY, as Secretary of the Army, DEFENDANTS

The following insertion is to be added to footnote 1 of the opinion in the above-captioned case:

> The class, as defined in plaintiff's motion to the district court dated June 4, 1975, consists of all "persons at least 60 years of age who have performed 20 years of service computed under 10 U.S.C. § 1332 since August 16, 1945 and otherwise are entitled to retired pay for non-regular military service, except that before August 16, 1945 they were a Reserve of an armed force or a member of the Army without component and did not perform active duty after April 15, 1917 but before November 12, 1918, or after September 8, 1940 and before January 1, 1947, or after June 26, 1950 but before July 28, 1953, and therefore were disqualified from Retired Pay Benefits by virtue of 10 U.S.C. § 1331(c)."

Also, page 5, lines 26 and 28: "pre-1940" should read "pre-1945."

Dated: January 23, 1976.

/s/ J. Edward Lumbard
J. EDWARD LUMBARD
United States Circuit Judge

/s/ Walter Bruchhausen
WALTER BRUCHHAUSEN
United States District Judge

/s/ Henry Bramwell
HENRY BRAMWELL
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 75 C 44

[Filed Jan. 26, 1976, U.S. District Court, E.D.N.Y.]

LOUIS J. FIOTO, on behalf of himself and all other persons, similarly situated, PLAINTIFFS

—against—

UNITED STATES DEPARTMENT OF THE ARMY, HOWARD CALLAWAY, as Secretary of the Army, DEFENDANTS

JUDGMENT

This action on behalf of the plaintiff and all others similarly situated, challenging the constitutionality of 10 U.S.C. § 1331(c), came on for hearing before a three-judge court consisting of the Honorable J. Edward Lumbard, United States Circuit Judge, the Honorable Henry Bramwell, United States District Judge, the Honorable Walter Bruchhausen, United States District Judge, and a decision of the Court having been duly rendered and an opinion and order having been filed, granting plaintiffs' motion for summary judgment and denying defendants' cross-motion for summary judgment, it is

ORDERED and ADJUDGED that plaintiffs' motion for summary judgment is granted; and it is further

ORDERED and ADJUDGED that plaintiff henceforth be placed on the Army's retirement rolls and that he immediately receive any and all retirement benefits which have accrued since his honorable discharge and which have been denied him under the Army's erroneous ruling; and it is further

ORDERED and ADJUDGED that the Secretary of the Army place all others in plaintiff Fioto's class on the Army retirement rolls and grant them retirement benefits accordingly; and it is further

ORDERED and ADJUDGED that defendants' cross-motion for summary judgment is denied

Dated: Brooklyn, New York January 23, 1976

/s/ Lewis Orgel
Clerk

Approved:

/s/ J. Edward Lumbard
United States Circuit Judge

/s/ Walter Bruchhausen
United States District Judge

/s/ Henry Bramwell
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 75 C 44

LOUIS J. FIOTO, on behalf of himself and all other persons, similarly situated, PLAINTIFFS

—against—

UNITED STATES DEPARTMENT OF THE ARMY, HOWARD CALLAWAY, as Secretary of the Army, DEFENDANTS

NOTICE OF APPEAL

Notice is hereby given that the defendant Secretary of the Army, hereby appeals to the Supreme Court of the United States, pursuant to 28 U.S.C. §§ 1252, 1253 and 2101, from the judgment entered in this action on January 26, 1976, by the three-judge District Court convened herein.

Dated at Brooklyn, New York this 25th day of February, 1976

DAVID G. TRAGER
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York 11201
Attorney for the defendant
Secretary of the Army

By: /s/ Paul B. Bergman
Assistant U.S. Attorney
Chief, Appeals Division

TO:

DAVID GOLDFARB, ESQ.
Attorney for Plaintiffs
The Legal Aid Society
Staten Island Neighborhood Office
42 Richmond Terrace
Staten Island, New York

A TRUE COPY
ATTEST

Dated Feb. 25, 1976
LEWIS ORGEL
Clerk

By /s/ Marilyn Glenn
Deputy Clerk

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 207082 252

Reprint

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1704

MARTIN R. HOFFMANN, SECRETARY OF THE ARMY,
Appellant

—*v.*—

LOUIS J. FIOTO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

JURISDICTIONAL STATEMENT FILED MAY 24, 1976
PROBABLE JURISDICTION NOTED OCTOBER 4, 1976

In the Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1704

MARTIN R. HOFFMANN, SECRETARY OF THE ARMY,
Appellant

—*v.*—

LOUIS J. FIOTO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

No. 75-44—Civ.—Bruchhausen, Bramwell, Lumbard

RELEVANT DOCKET ENTRIES

Date	PROCEEDINGS
1975	
Jan. 10	COMPLAINT
Feb. 5	Plaintiff's interrogatories.
Mar. 12	ANSWER
April 2	Defendant's answers to interrogatories.
May 10	Second interrogatories to defendants.
June 6	Notice of motion for an order declaring above a class action.
July 15	Before BRUCHHAUSEN, J.—Motion for convening a three judge court granted on consent. Motion determining that this action be maintained as a class action—deferred to the three judge court.
July 16	Memorandum in response to plaintiff's motion re Rule 23.
July 22	By BRUCHHAUSEN, J.—Memorandum and Order dated 7-18-75 granting motion to convene a three judge court.
November 5	Copy of Order of Irving R. Kauffman for designation of Judges.
November 10	By BRUCHHAUSEN, J.—MEMORANDUM & ORDER dated 11-10-75 setting 12-15-75 as the trial date.
November 26	By BRUCHHAUSEN, J.—Memorandum dated 11-26-75 directing the plaintiff's attorney and the defendant's attorney to forward certain documents to Judges Bramwell and Lumbard.

Date	PROCEEDINGS

December 5 Defendant's notice of motion for an order granting judgment on pleadings filed with Memorandum in support.

December 5 Notice of motion for class action certification, summary judgment, and permanent injunction filed with Memorandum in support.

December 12 Memorandum in opposition to defendants' motion for judgment on the pleadings.

December 15 Before BRUCHHAUSEN, BRAMWELL, & LUMBARD—Case called for hearing on motions for summary judgment. Motions argued. Decision reserved.

1976

January 12 By BRUCHHAUSEN, J.—Memorandum and Order dated 1-12-76 granting class action certification.

January 14 By LUMBARD, USCJ; BRUCHHAUSEN, USDJ; BRAMWELL, USDJ—Opinion dated 1-14-76 granting Fioto's motion for summary judgment, direct that he henceforth be placed on the Army's retirement rolls, and order that he immediately receive any and all retirement benefits which have accrued since his honorable discharge and which have beeen unlawfully denied him as a result of the Army's erroneous ruling. We also direct the Secretary to place all others in Fioto's class on the Army's retirement rolls and grant them requirement benefits accordingly. The defendant's cross-motion for summary judgment is correspondingly denied. So ordered

January 26 AMENDMENT to opinion dated 1-14-76. (LUMBARD, CIR. J; BRUCHHAUSEN, J, BRAMWELL, J.)

January 26 JUDGMENT dated 1-23-76 granting plaintiffs' motion for summary judgment. (Approved by LUMBARD, BRUCHHAUSEN & BRAMWELL)

Date	PROCEEDINGS

February 10 Amended notice of motion for an order pursuant to Rule 62.

February 3 Affidavit of D. Goldfarb in Opposition to dedefendants' motion to stay judgment.

February 3 Memorandum in Opposition to Defendants' Motion for a Stay of Judgment.

February 18 BRUCHHAUSEN, J. and BRAMWELL, J.—Order dated 2-17-76 granting motion to stay the judgment of this court with respect to members of the class.

February 25 NOTICE OF APPEAL.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 75 C 44

LOUIS J. FIOTO, on behalf of himself and all other persons similarly situated, PLAINTIFFS

—against—

UNITED STATES DEPARTMENT OF THE ARMY; HOWARD CALLAWAY, AS SECRETARY OF THE ARMY, DEFENDANTS

COMPLAINT

PRELIMINARY STATEMENT

1. By this proceeding plaintiff, on behalf of himself and all others similarly situated, seeks a judgment declaring unconstitutional 10 USC § 1331(c) on its face and as applied as violative of plaintiff's constitutional right to equal protection; plaintiff, on behalf of himself and all others similarly situated, seeks a judgment enjoining defendants from applying 10 USC § 1331(c) to plaintiff or his class; and plaintiff, on behalf of himself and all others similarly situated, seeks a judgment directing defendants to grant them retirement benefits pursuant to 10 USC § 1331(a).

2. 10 USC 1331(c) reads as follows:

> (c) No person who, before August 16, 1945, was a Reserve of an armed force, or a member of the Army without component or other category covered by section 1332(a)(1) of this title except a regular component, is eligible for retired pay under this chapter, unless he performed active duty after April 5, 1917, and before November 12, 1918, or after September 8, 1940, and before January 1, 1947, or unless he performed active duty (other than for training) after June 26, 1950, and before July 28, 1953. Aug. 10, 1956, c. 1041, 70A Stat. 102; Aug. 21, 1958, Pub.L. 85-704, 72 Stat. 702; Sept. 2, 1956, Pub.L. 85-861, § 33(a)(8), 72 Stat. 1564.

3. Specifically plaintiff qualifies for retirement benefits pursuant to 10 USC 1331(a) with twenty years of service after August 16, 1945. Plaintiff also served in the Reserve from January 11, 1933 to September 25, 1940; thus plaintiff has been disqualified from all retirement benefits pursuant to 10 USC 1331(c).

4. This is a proper case for the convening of a three judge court pursuant to 28 USC §§ 2282 and 2284, in that plaintiff herein seeks an injunction to restrain the defendants from the enforcement, operation and execution of an Act of Congress on the ground that said Act is repugnant to the United States Constitution.

JURISDICTION

5. Jurisdiction over this suit is conferred upon this court by 28 USC § 1361 as an action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to plaintiffs; 28 USC § 1331(a), as a controversy arising under the Constitution or laws of the United States where the amount involved exceeds $10,000; 5 USC § 702, as a proceeding to review agency action which adversely affects or aggrieves a person within the meaning of a relevant statute; 28 USC §1343(4), as an action to recover damages or secure equitable relief under an Act of Congress providing for the protection of civil rights.

6. The amount in controversy exclusive of interest and costs exceeds the sum of $10,000.00.

7. Plaintiff raises questions of violation of his constitutional rights, in that the Army has denied him equal protection under the law in denying him retirement benefits and treating him differently from other servicemen solely because he served additional time beyond the required 20 years in inactive reserve.

CLASS ACTION ALLEGATIONS

8. Plaintiff brings this action as a class action pursuant to Rule 23(a) and, in addition Rule 23(b)(2) or in the alternative Rule 23(b)(1)(A) or (B) of the Federal Rules of Civil Procedure.

9. This class is composed of persons at least 60 years of age who have performed 20 years of service computed under 10 USC § 1332 since August 16, 1945 and otherwise are entitled to Retired Pay for Non-Regular Military Service, except that before August 16, 1945 they were a Reserve of an armed force or a member of the Army without component and did not perform active duty after April 5, 1917 but before November 12, 1918, or after September 8, 1940 and before January 1, 1947 or after June 26, 1950 and before July 28, 1953, and therefore were disqualified from Retired Pay Benefits by virtue of 10 USC § 1331(c).

10. The class is so numerous that joinder of all members is impracticable. Plaintiff cannot state the exact number of persons in the class, but the information is possessed by or available to defendants. (Rule 23(a)(1)).

11. There are questions of law and fact common to the class, that is, whether the statute on its face and as applied to plaintiff and his class is constitutional. (Rule 23(a)(2)).

12. Plaintiff's claim is typical of the claims of the class. (Rule 23(a)(3)).

13. Plaintiff's attorney have legal resources and experience adequate to protect all members of the class and plaintiff will fairly and adequately protect the interests of the class. (Rule 23(a)(4)).

14. In refusing plaintiff's application for Retired Pay Benefits, defendants have acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief and corresponding declaratory relief with respect to the class as a whole. (Rule 23(b))(2)).

15. The prosecution of separate actions by individual members of the class would create a risk of varying adjudications with respect to individual members of the

class which might establish incompatible standards of conduct for the defendants in this action and would create a risk of adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests. (Rule 23(b)(1)(A) and (B)).

DEFENDANTS

16. Defendant HOWARD CALLOWAY is the Secretary of the Army who has ultimate authority and control over plaintiff's retirement pay benefits. Pursuant to 10 USC § 1331(b) application for retired pay would be made to the Secretary of the Army. The United States Army is the branch of the armed services in which plaintiff last served.

PLAINTIFF LOUIS J. FIOTO

17. Plaintiff LOUIS J. FIOTO is presently retired from service in the United States Army. He was born December 9, 1907. Plaintiff served in the United States Coast Guard from 1927 to 1941. He served in the Army National Guard from 1933 to 1940 and again from 1947 to 1967. He received an Honorable Discharge on December 9, 1967 having reached the mandatory age of 60. (Exhibit 1).

18. Plaintiff met all requirements for Retired Pay for Non-Regular Service pursuant to 10 USC § 1331(a).

19. Plaintiff on September 5, 1967 filed an application for Retired Pay Benefits. (Exhibit 2).

20. On or about January 15, 1970 plaintiff received notice from the Department of the Army stating that pursuant to Title 10, United States Code, Chapter 67: "A further requirement of the law is that a person who was a member of the Reserve component before 16 August 1945 must have served on active duty during some portion of World War I (5 April 1917 to 12 November 1918), or World War II (8 September 1940 to 1 January

1947) or active duty other than for training during the Korean War (26 June 1950 to 28 July 1953). By law, only active Federal service performed under competent military orders may be created as active duty for retired pay purposes." (Exhibit 3). Plaintiff was further informed that since his entire service was performed with the National Guard and he did not serve on extended duty during a war-time period, he is not eligible for retired pay under 10 USC § 1331(c).

21. On February 21, 1974, a law assistant with the Legal Aid Society wrote the Commanding General of the New York National Guard requesting again retired pay benefits for plaintiff. In that letter 10 USC § 1331(c) was cited and it was noted that plaintiff served two terms, one from January 11, 1933 to September 25, 1940, a second from October 27, 1947 to December 9, 1967. This second term in and of itself entitled plaintiff to retired pay benefits since it began after 1945 and continued for a full 20 years. (Exhibit 4).

22. By letter dated April 2, 1974, the Legal Aid Society was notified that plaintiff's application for retired pay must be made to the Secretary of the Army. (Exhibit 5).

23. On May 28, 1974, David Goldfarb, Esq., an attorney with The Legal Aid Society, wrote the Secretary of the Army stating that the Society represented plaintiff, and requesting retired pay benefits be granted. (Exhibit 6).

24. By letter dated June 18, 1974, the Department of the Army, Office of the Adjutant General informed Mr. Goldfarb that, "[d]eviation from the law to allow Mr. Fioto to be granted retirement pay on the basis of his service subsequent to 16 August 1945 when he was in fact, a member of a Reserve component from 11 January 1933 to 25 September 1940 and has not fulfilled the war service requirement of the law for entitlement to pay is not authorized." (Exhibit 7).

25. On June 26, 1974 plaintiff filed an "Application for Correction of Military or Naval Record Under the Provisions of Title 10, U.S. Code, Sec. 1552." (Exhibit 8). A memorandum was also submitted.

26. By letter dated September 25, 1974 The Army Board for Correction of Military Records denied plaintiff's application. (Exhibit 9).

27. Petitioner has now exhausted all administrative remedies and there is no further appeal he can take within the Department of the Army.

STATEMENT OF CLAIM

28. 10 USC 1331(c) on its face and as applied to plaintiff and members of his class, and defendant's policies, practices and procedures pursuant thereto violate equal protection principles of the Due Process Clause of the Fifth Amendment because plaintiff and others similarly situated are singled out and denied retired pay benefits that would be given to others with the same twenty years of service after 1945, because plaintiff also served in the Reserve before 1945. Such discrimination is without rational or compelling jurisdiction. Plaintiff, and others similarly situated, who were old enough to serve before 1945, and did so, are being denied benefits that younger men, who could not and did not serve in that period, freely receive.

RELIEF REQUESTED

WHEREFORE, plaintiff on behalf of himself and all others similarly situated, respectfully asks that this Court:

1. Assume jurisdiction of this cause and convene a three judge court pursuant to 28 USC §§ 2282 and 2284.
2. Determine by order, pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, that this action be maintained as a class action.
3. Pursuant to 28 USC §§ 2201 and 2202 and Rule 57 of the Federal Rules of Civil Procedure, enter a judgment declaring 10 USC § 1331(c) unconstitutional on its face and as applied to plaintiff and his class.
4. Enter a permanent injunction restraining the defendants, their officers, agents, servants, employees and successors in office from applying 10 USC § 1331(c).

5. Enter an order directing defendants to grant retirement benefits to plaintiff and his class pursuant to 10 USC § 1331(a), retroactive to the date of their first eligibility.

6. Pursuant to Rule 54(d) of the Federal Rules of Civil Procedure allow plaintiffs reasonable attorneys fees and their costs and disbursements herein and also grant them and the members of their class such additional and alternative relief as may seem to this Court be just, proper and equitable.

Dated: Richmond, New York
January 7, 1975.

Respectfully submitted

/s/ Joan Mangones

/s/ David Goldfarb

JOAN MANGONES,
THE LEGAL AID SOCIETY
56 Bay Street
Staten Island, N.Y. 10301
212-273-6677
DAVID GOLDFARB, of Counsel

Honorable Discharge

from the Armed Forces of the United States of America

This is to certify that

LOUIS JOSEPH FIOTO MSG E-7 NG21916240 102d Ord Co (DS) NYARNG

was Honorably Discharged from the ARMY NATIONAL GUARD OF

NEW YORK

AND AS A RESERVE OF THE ARMY

on the 9TH *day of* DECEMBER 1967

This certificate is awarded as a testimonial of Honest and Faithful Service

THIS DISCHARGE DOES NOT RELIEVE THE INDIVIDUAL NAMED HEREIN FROM ANY RESERVE OBLIGATION TO WHICH HE MAY BE SUBJECT UNDER THE PROVISIONS OF THE UNIVERSAL MILITARY TRAINING AND SERVICE ACT, AS AMENDED

Ralph C. Bonavist

RALPH C. BONAVIST
LTC ORD NYARNG
COMMANDING

DD FORM 53 PREVIOUS EDITIONS OF THIS FORM IS DATED 1 JAN 48, WHICH IS OBSOLETE

DEPARTMENTS OF THE ARMY AND THE AIR FORCE
NATIONAL GUARD BUREAU

REPORT OF SEPARATION AND RECORD OF SERVICE IN THE ARMY NATIONAL GUARD OF NEW YORK
AND AS A RESERVE OF THE ARMY
TYPE OF DISCHARGE HONORABLE
(No erasures or alterations in this entry valid)

1. NAME (Last, first, middle initial)	2. SERVICE NO	3. GRADE	4. ARM OR SERVICE	5. TERM OF ENLISTMENT
Fiore Louis J	21962k0	MSG NY	Ordnance	Five Years

6. ORGANIZATION AND HOME STATION	7. DATE OF DISCHARGE	8. PLACE OF DISCHARGE
102d Ord Co(DS) NY END 102 6th Avenue Bklyn NY	9 December 1967	Brooklyn, New York

9. PERMANENT ADDRESS FOR MAILING PURPOSES	10. DATE OF BIRTH	11. PLACE OF BIRTH
29 Olga Place Staten Island NY	9 December 1907	Brooklyn, New York

12. CIVILIAN OCCUPATION (Include name and address of present employer, or if unemployed, the last employer)
Sr Auto Repairman

13. RACE			14. MARITAL STATUS			15. U.S. CITIZEN	
WHITE	NEGRO	OTHER (Specify)	SINGLE	MARRIED	OTHER (Specify)	YES	NO
X				X		X	

16. COLOR EYES	17. COLOR HAIR	18. HEIGHT	19. WEIGHT	20. NO DEPENDENTS
Brown	Grey	5 FT 5 IN	142 LBS	Two

MILITARY HISTORY

21. DATE AND PLACE OF ENLISTMENT	22. MILITARY OCCUPATIONAL SPECIALTY AND NUMBER
	MSGT E-7 76Y40

23. MILITARY QUALIFICATION AND DATE (i.e. Infantry, Aviation, Marksmanship Badge, etc)
Rifle Cal 30 M1 Exp 30 May 61
Rifle Cal 30 M1 SS 19 May 62

24. DECORATIONS, CITATIONS, MEDALS, BADGES, COMMENDATIONS, AND CAMPAIGN RIBBONS AWARDED OR AUTHORIZED (This period of service)
None

25. PRIOR SERVICE (Branch of service, inclusive dates, and primary duty with MOS)
NAVY USCG 27 Jun 27 - 26 Jun 30 Surfman
NAVY USCG 30 Jul 30 - 30 Jul 31 S1/c
ARMYUS 11 Jan 33 - 7 Oct 40 1821 SGT
ARMYUS 27 Oct 47 - 26 Nov 62 639.70 MSGT

26. LENGTH THIS SERVICE			27. TOTAL SERVICE FOR PAY PURPOSES			28. EDUCATION (Years)			29. HIGHEST GRADE HELD
YEARS	MONTHS	DAYS	YEARS	MONTHS	DAYS	GRAMMAR	HIGH SCHOOL	COLLEGE	
5	0	33	27	8	24	8	-	-	MSGT E-7

30. SERVICE SCHOOLS ATTENDED AND DATES
Auto Maint Fort Dix, N.J. 11 Dec 50 to 2 Feb 51

31. REASON AND AUTHORITY FOR DISCHARGE
Dy to ED due to having met mandatory age 60, 9 December 1967

32. REMARKS (This space for completion of above items or entry of other items specified in MD directive)
NGB Form 55 given to EM by Unit Commander

33. SIGNATURE OF PERSON BEING DISCHARGED
(Full name) [illegible] FIORE

34. SIGNATURE OF OFFICER AUTHORIZED TO SIGN
(Type name, grade and organization)
FRANCIS J. PATRICCHE CPT CMD 102d Ord CO(DS)

NGB FORM 22
15 JAN 58

1. Insert either Army or Air
2. Insert either Army or Air Force

REPLACES NGB FORM 22 DATED 15 NOV 55, WHICH IS OBSOLETE
GPO: 1958 O—491882

EXHIBIT 1

-12-

APPLICATION FOR RETIRED PAY

SEE REVERSE SIDE FOR INSTRUCTIONS

See Privacy Act Statement No. 22-R0M

1. Commanding Officer
US Army Administration Center (ATTN AGUZ-SHP-CR)
100 Park Boulevard St Louis, Missouri 63132

2. DATE OF BIRTH
9 Dec 07

3. RETIRED PAY TO BEGIN (Date)
1 Jan 68

4. LAST NAME - FIRST NAME - MIDDLE INITIAL
FIORE, LOUIS J

5. GRADE, RATE OR RANK
MSGT E-7

6. SERVICE NUMBER
21962k0

7. ADDRESS
29 Olga Place Staten Island New York 10305

8. PRESENT ASSIGNMENT
102d Ord Co(DS)
New York Army National Guard

SERVICE BEFORE 1 JULY 1949

9. ARMED FORCE AND COMPONENT	10. GRADE OR RATING	11. APPROXIMATE DATES OF SERVICE FROM (DAY / MONTH / YR)	TO (DAY / MONTH / YR)	12. ACTIVE DUTY FROM (DAY / MONTH / YR)	TO (DAY / MONTH / YR)
Navy USCG	Surfman	27 Jun 27	26 Jun 30	27 Jun 27	26 Jun 30
Navy USCG	S1/C	30 Jul 30	30 Jul 31	30 Jul 30	30 Jul 31
Army ARNG	Sgt	11 Jan 33	7 Oct 40		
Army ARNG	MSGT	27 Oct 47	26 Oct 49		

SERVICE AFTER 30 JUNE 1949

13. RETIREMENT YEAR FROM (DAY / MONTH / YR)	TO (DAY / MONTH / YR)	14. ARMED FORCE AND COMPONENT	15. GRADE OR RATING	16. ACTIVE DUTY FROM (DAY / MONTH / YR)	TO (DAY / MONTH / YR)	17. RETIREMENT POINTS EARNED
27 Oct 49	26 Nov 62	Army ARNG	MSGT E7	24 Jul 55	7 Aug 55	15
27 Dec 62	9 Dec 67	Army AUNG	MSGT E7	25 Jun 55	30 Jun 55	6
				1 Jul 55	9 Jul 55	9
				21 Jul 56	4 Aug 56	15
				3 Aug 57	17 Aug 57	15
				16 Aug 58	30 Aug 58	15
				11 Jul 59	25 Jul 59	15
				6 Aug 60	20 Aug 60	15
				24 Jun 61	30 Jun 61	7
				1 Jul 61	8 Jul 61	8
				1 Sep 62	15 Sep 62	15
				18 Jul 63	3 Aug 63	17
				13 Aug 64	29 Aug 64	17
				5 Jun 65	19 Jun 65	15
				13 Aug 65	27 Aug 65	15
				24 Jun 67	8 Jul 67	17

SIGNATURE
Louis J. Fiore

19. DATE
5 Sep 67

DD FORM 1 SEP 63 108

PREVIOUS EDITIONS OF THIS FORM ARE OBSOLETE.

BEST COPY AVAILABLE

EXHIBIT 2

13

EXHIBIT 3

DEPARTMENT OF THE ARMY
OFFICE OF THE ADJUTANT GENERAL
U.S. ARMY ADMINISTRATION CENTER
St. Louis, Missouri 63132

[SEAL]

IN REPLY REFER TO:
AGUZ-PAD-SRR Fioto, Louis J.
NG 21 916 240

25 Jan. 1970

Mr. Louis J. Fioto
29 Olga Place
Staten Island, NY 10305

Dear Mr. Fioto:

This is in further reference to your application for retired pay benefits.

A statement of service showing you had service in the New York National Guard from 11 January 1933 to 25 September 1940 and 27 October 1947 to 9 December 1967 has been received.

Title 10, United States Code, Chapter 67, authorizes retired pay for members and former members of the Reserve components who have attained age 60 and completed a minimum of 20 years of qualifying service. A further requirement of the law is that a person who was a member of the Reserve component before 16 August 1945 must have served on active duty during some portion of World War I (5 April 1917 to 12 November 1918), or World War II (8 September 1940 to 1 January 1947) or active duty other than for training, during the Korean War (26 June 1950 to 28 July 1953). By law, only active Federal service performed under component military orders may be credited as active duty for retired pay purposes.

Since your entire service was performed with the National Guard and you did not serve an extended duty

during a war-time period, you are not eligible for retired pay under the above cited law.

Sincerely,

/s/ C. A. Stanfield
C. A. STANFIELD
Colonel, AGC
Commanding

EXHIBIT 4

THE LEGAL AID SOCIETY
STATEN ISLAND NEIGHBORHOOD OFFICE

66 Bay Street; Staten Is., N.Y. 10301
Joan Mangones, Attorney-in-Charge
Phone (212) 273-6677

February 21, 1974

Commanding General
National Guard
Albany,
New York

Re: AGUZ-PAD-SRR *Fioto, Louis J.*
NG 21 916 240

Dear Sir:

I am hereby requesting that retired pay benefits be granted to Louis J. Fioto in consideration of his service to the New York National Guard from January 11, 1933 to September 25, 1940 and October 27, 1947 to December 9, 1967, a total of twenty-eight years.

Title 10, United States Code, Chapter 67, authorizes retired pay for members and former members of the Reserve components who have attained age 60 and completed a minimum of 20 years qualifying service. I am fully cognizant of the special requirements of § 1331(c):

> No person who, before August 16, 1945, was a Reserve of an armed force; or a member of the Army component or other category covered by § 1332 (a)(1) of this title except a regular component, is eligible for retired pay under this chapter, unless he performed active duty after April 5, 1917 and before November 12, 1918 or after September 8, 1940, and before January 1, 1947 or unless her performed active duty after June 26, 1950, and before July 28, 1953.

Mr. Fioto served two independent terms in the National Guard. The first term beginning January 11, 1933 and ending September 25, 1940. The second term beginning October 27, 1947 and ending on December 9, 1967. This second term in and of itself entitled Mr. Fioto to retired pay benefits since it began after 1945 and continued for a full 20 years.

Any interpretation of § 1331(c) which would penalize Mr. Fioto for services rendered during that first term of service, in excess of the minimum requirements for retired pay benefits, would be blatantly unfair and patently discriminatory.

I further request you to consider the possibility of re-instating Mr. Fioto in the National Guard so that he might be re-employed as a National Guard Technician (M/Sgt.) for the New York State Arsenal, Shop B. I have spoken to Chief Warrant Officer Louis Colangelo, who is in charge of Shop B in Brooklyn. He is aware of Mr. Fioto's excellent physical and mental condition and informs me that he would gladly welcome the return of a worker of Mr. Fioto's caliber.

Thank you for your time and consideration in this matter.

Yours truly,
THE LEGAL AID SOCIETY

Charles Carnesi
Law Assistant

CC:mi

EXHIBIT 5

[SEAL]

STATE OF NEW YORK
DIVISION OF MILITARY AND NAVAL AFFAIRS

Public Security Building
State Campus
Albany, New York 12226

Malcolm Wilson
Governor
Commander in Chief

John C. Baker
Major General
Chief of Staff to the Governor

MNJA

2 April 1974

Mr. Charles Carnesi
Law Assistant
The Legal Aid Society
56 Bay Street
Staten Island, New York 10301

Re: Fioto, Louis J.

Dear Mr. Carnesi:

Your letter to the Commanding General has been referred to this office for reply.

As you have indicated, Title 10, United States Code, § 1331(c) spells out the requirements for retired pay for members of the Reserve Components. Any changes to this statute would require Congressional action, and cannot be altered by interpretation or otherwise at this Headquarters. It should be noted that the intent of Congress was to require active service, during a period of national emergency, in World War I or II or the Korean War, for those individuals who before 16 August 1945 were members of a Reserve Component of the Armed Forces.

This section also requires that application for retired pay must be made to the secretary of the military service concerned; in this case, the Secretary of the Army.

Mr. Fioto's records indicate that he was discharged from the Army National Guard by virtue of reaching age 60, which is also retirement age for his technician position.

Sincerely yours,

/s/ Carson Leonard
CARSON LEONARD
LTC, JAGC—RET
Assistant Legal Officer

CL/dc

EXHIBIT 6

THE LEGAL AID SOCIETY
STATEN ISLAND NEIGHBORHOOD OFFICE

56 Bay Street; Staten Is., N.Y. 10301
Joan Mangones, Attorney-in-Charge
Phone (212) 273-6677

May 28, 1974

Secretary of the Army
Pentagon
Washington, D.C.
Re: AGUZ-PAD-SRR Fioto, Louis J.
NG 21 916 240

Dear Sir:

We represent Louis J. Fioto. I am hereby requesting that retired pay benefits be granted to Louis J. Fioto in consideration for his service to the New York National Guard from January 11, 1933 to September 25, 1940 and October 27, 1947 to December 9, 1967, a total of twenty-eight years.

Title 10, United States Code, Chapter 67, authorizes retired pay for members and former members of the Reserve components who have attained age 60 and completed a minimum of 20 years qualifying service. I am fully cognizant of the special requirements of § 1331(c):

> No person who, before August 16, 1945, was a Reserve of an armed force, or a member of the Army component or other category by § 1332(a)(1) of this title except a regular component, is eligible for retired pay under this chapter, unless he performed active duty after April 5, 1917 and before November 12, 1918 or after September 8, 1940, and before January 1, 1947 or unless he performed active duty after June 26, 1950, and before July 28, 1953.

Mr. Fioto served two independent terms in the National Guard. The first term beginning January 11, 1933 and ending September 25, 1940. The second term beginning October 27, 1947 and ending on December 9, 1967. This second term in and of itself entitled Mr. Fioto to retired pay benefits since it began after 1945 and continued for a full 20 years.

I am enclosing letters from Colonel Stanfield of the Department of the Army and LTC Leonard of the New York State Division of Military Affairs.

Please advise this office of your final decision regarding Mr. Fioto's retirement benefits.

Sincerely,
THE LEGAL AID SOCIETY

David Goldfarb
Staff Attorney

DG:mi

bc: John Alexander, Esq.
Legal Services for the Elderly Poor
2095 Broadway
New York, N.Y. 10023

EXHIBIT 7

DEPARTMENT OF THE ARMY
OFFICE OF THE ADJUTANT GENERAL

U.S. Army Reserve Components Personnel and
Administration Center
St. Louis, Missouri 63132

[SEAL]

IN REPLY REFER TO:

AGUZ-RAD-SI Fioto, Louis J. 28, Jun. 1974
21 916 240

Mr. David Goldfarb
Attorney at Law
The Legal Aid Society
56 Bay Street
Staten Island, NY 10301

Dear Mr. Goldfarb:

This refers to your inquiry in behalf of Mr. Louis J. Fioto requesting retired pay benefits in consideration for his service to the New York National Guard.

Deviation from the law to allow Mr. Fioto to be granted retirement pay on the basis of his service subsequent to 16 August 1945 when he was, in fact, a member of a Reserve component from 11 January 1933 to 25 September 1940 and has not fulfilled the war service requirement of the law for entitlement to pay is not authorized.

Mr. Fioto's only recourse for further appeal of his case is to the Army Board for Correction of Military Records if he believes that an injustice exists by reason of denial of entitlement to retirement pay. That Board was established by Congress and is empowered to determine the existence of an error or injustice and, if appropriate,

to correct a record to provide relief. The inclosed application form, with instruction sheet, is for his use if he wishes to apply.

Sincerely,

/s/ Robert L. Gwaltney
ROBERT L. GWALTNEY
LTC, AGC
Director, Retired Activities
Directorate

Inclosures

APPLICATION FOR CORRECTION OF MILITARY OR NAVAL RECORD
UNDER THE PROVISIONS OF TITLE 10, U.S. CODE, SEC. 1552
(See instructions on reverse side BEFORE completing application.)

Form Approved
Budget Bureau No. 22-R009

BRANCH OF SERVICE: ☑ ARMY ☐ NAVY ☐ AIR FORCE ☐ MARINE CORPS ☐ COAST GUARD

1. NAME (Last-first-middle initial) (Please print)	2. PRESENT RATE, GRADE	3. SERVICE NUMBER	4. SOCIAL SECURITY ACCOUNT NUMBER
FIOTO, LOUIS J.	retired USGT E-7	NG21916240	100-01-1527

5. TYPE OF DISCHARGE (If by court-martial, state type of court.)	6. PRESENT STATUS, IF ANY, WITH RESPECT TO THE ARMED SERVICES (Active duty, retired, reserve, etc.)	7. DATE OF DISCHARGE OR RELEASE FROM ACTIVE DUTY
HONORABLE	RETIRED	12/9/67

8. ORGANIZATION AT TIME OF ALLEGED ERROR IN RECORD	9. I DESIRE TO APPEAR BEFORE THE BOARD IN WASHINGTON, D.C. (No expense to the Government.)
RETIRED	☐ YES ☑ NO

10. NAME AND ADDRESS OF COUNSEL (If any): DAVID GOLDFARB,ESQ., THE LEGAL AID SOCIETY, 56 Bay Street Staten Island N.Y. 10301

11. I REQUEST THE FOLLOWING CORRECTION OF ERROR OR INJUSTICE: A decision that I am entitled to retirement pay. Upon such decision I request payment of the money retroactive to 9/5/67 when I first applied for retired pay benefits.

12. See other side.

13. I BELIEVE THE RECORD TO BE IN ERROR OR UNJUST IN THE FOLLOWING PARTICULARS: ~~I have served sufficient time subsequent to 1945 to be granted retirement pay. The fact that I performed additional service prior to 1945 should not penalize me in this respect. Then there was no possibility of completing 20 years of service after 1945. Thus, the statute could not and did not contemplate the situation existing in the present case. Title 10, Chap. 67, §1331(c) was enacted in the 1950's.~~

14. IN SUPPORT OF THIS APPLICATION I SUBMIT AS EVIDENCE THE FOLLOWING: *(If Veterans Administration records are pertinent to your case, give Regional Office location and Claim Number.)*

Pertinent letters respecting my request for benefits.
My service records are available to you.

15. a. THE DATE OF THE DISCOVERY OF THE ALLEGED ERROR OR INJUSTICE WAS June 18, 1974. b. IF MORE THAN THREE YEARS SINCE THE ALLEGED ERROR OR INJUSTICE WAS DISCOVERED, STATE WHY THE BOARD SHOULD FIND IT IN THE INTEREST OF JUSTICE TO CONSIDER THIS APPLICATION.

I first requested benefits on September 6, 1967. Various correspondence has resulted since then (see attachments) resulting in final refusal on June 18, 1974.

16. APPLICANT MUST SIGN IN THE SPACE PROVIDED. IF THE RECORD IN QUESTION IS THAT OF A PERSON WHO IS DECEASED, INCOMPETENT, MISSING, LEGAL PROOF OF CLAIM OR INCOMPETENCY MUST ACCOMPANY APPLICATION. IF APPLICATION IS SIGNED BY SPOUSE, WIDOW OR WIDOWER, NEXT OF KIN OR LEGAL REPRESENTATIVE, INDICATE RELATIONSHIP OR STATUS IN APPROPRIATE BOX.
☐ SPOUSE ☐ WIDOW ☐ WIDOWER ☐ NEXT OF KIN ☐ LEGAL REPRESENTATIVE ☐ OTHER (Specify)

18. I MAKE THE FOREGOING STATEMENTS, AS PART OF MY CLAIM, WITH FULL KNOWLEDGE OF THE PENALTIES INVOLVED FOR WILFULLY MAKING A FALSE STATEMENT OR CLAIM. (U.S. Code, Title 18, Sec. 287, 1001, provides a penalty of not more than $10,000 or not more than 5 years imprisonment or both.)

17. COMPLETE ADDRESS INCLUDING ZIP CODE (Applicant should forward notification of all changes of address.)	DOCUMENT NUMBER (Do not write in this space.)
29 OLGA PLACE, STATEN ISLAND, N.Y. 10305	
18. DATE: June 26, 1974	19. SIGNATURE (Applicant must sign here.): Louis J. Fioto

DD FORM 149 PREVIOUS EDITION OF THIS FORM IS OBSOLETE UNLESS USED UNTIL STOCK IS EXHAUSTED

EXHIBIT 8-p.1

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INSTRUCTIONS

1. For detailed information see:
   Air Force Regulation 31-3,
   Army Regulations 15-185
   Coast Guard, Code of Federal Regulations Title 33, Part 52
   Navy, NAVEXOS P-473, as revised.
2. Submit original only of this form.
3. Complete all items. If the question is not applicable, mark--"None".
4. If space is insufficient, use "Remarks" or attach additional sheet if necessary.
5. Various veterans and service organizations furnish counsel without charge. These organizations prefer that arrangements for representation be made through local posts or chapters.
6. List all attachments or inclosures.
7. ITEMS 9 and 10. Personal appearance of you and your witnesses or representation by counsel is not required to insure full and impartial consideration of applications. Appearances and representations are permitted at no expense to the Government when a hearing is authorized.
8. ITEM 11. State the specific correction of record desired.
9. ITEM 12. In order to justify correction of a military or naval record, it is necessary for you to show to the satisfaction of the Board, or it must otherwise satisfactorily appear, that the alleged entry or omission in the record was in error or unjust. Evidence may include affidavits or signed testimony of witnesses, executed under oath, and a brief of arguments supporting application. All evidence not already included in your record must be submitted by you. The responsibility for securing new evidence rests with you.
10. ITEM 14. 10 U.S.C. 1552b provides that no correction may be made unless request is made within three years after the discovery of the error or injustice, but that the Board may excuse failure to file within three years after discovery if it finds it to be in the interest of justice.

MAIL COMPLETED APPLICATIONS TO APPROPRIATE ADDRESS BELOW

ARMY	NAVY AND MARINE CORPS	COAST GUARD	AIR FORCE
~~Army Board for Correction of Military Records Department of the Army Washington, D.C. 20310~~ DAJA-SAMD-CO	Board for Correction of Naval Records Department of the Navy Washington, D.C. 20370	U.S. Coast Guard ATTN: Senior Member Board for Correction of Coast Guard Records Washington, D.C. 20591	USAFMPC (AFPMDRAIB) RANDOLPH AFB TEX 78148

REMARKS

12. I believe the record to be in error or unjust in the following particulars,

I have served sufficient time subsequent to 1945 to be granted retirement pay. The fact that I performed additional service prior to 1945 should not penalize me in this respect. Title 10, Chapter 67, §1331(c) was enacted in the 1950's when there was no possibility of completing 20 years of service after 1945. Thus, the statute could not and did not contemplate the situation existing in the present case.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1970 O - 377-343

D-23774

EXHIBIT 8 p.2

BEST COPY AVAILABLE

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EXHIBIT 9

AGUZ-SAD-CO Fioto, Louis J. 25 Sep. 1974
100 01 1527 23/111/4

MSG Louis J. Fioto, Retired
29 Olga Place
Staten Island, NY 10305

Dear Sergeant Fioto:

I refer to your application for correction of military records.

The Army Board for Correction of Military Records may deny an application if a sufficient basis for review has not been established.

After examining and considering your Army records and facts you presented, the Army Board for Correction of Military Records determined on 28 August 1974 that insufficient evidence has been presented to indicate probable material error or injustice; accordingly, your application was denied.

In the absence of new and material evidence tending to show existence of error or injustice in the military records, further consideration by the Board is not contemplated.

Your counsel has been furnished a copy of this letter.

Sincerely,

VERNE L. BOWKERS
Major General, USA
The Adjutant General

CF:

David Goldfarb, Esq.
The Legal Aid Society
56 Bay Street
Staten Island, NY 10301
CIS:PCM:iq
F.#750049

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 75 C 44

LOUIS J. FIOTO, on behalf of himself and all other persons similarly situated, PLAINTIFF

—against—

UNITED STATES DEPARTMENT OF THE ARMY;
HOWARD C. CALLAWAY, as Secretary of the Army,
DEFENDANTS

ANSWER

FIRST DEFENSE

1. This court lacks subject matter jurisdiction over the plaintiff's complaint.

SECOND DEFENSE

2. Defendants admit the allegations contained in paragraphs 16, 17, 19, 20, 22, 23, 24, 25, 26 and 27 of the complaint; and deny the allegations contained in paragraphs 6, 7, 18 and 28 of the complaint.

3. The allegations contained in paragraph 1 of the complaint constitute questions of law which defendants respectfully refer to the court and characterizations of the complaint which do not require any response.

4. As to the allegations contained in paragraph 2 of the complaint, defendants respectfully refer to the court to the official text of the statute.

5. Defendants admit the allegations contained in paragraph 3 of the complaint except that defendants deny the allegation that plaintiff qualifies for retirement benefits under 10 U.S.C. § 1331(a).

6. The allegations contained in paragraphs 4, 5, 8, 9, 10, 11, 12, 13, 14, and 15 of the complaint constitute

questions of law which defendants respectfully refer to the court.

7. Defendants admit the allegations contained in paragraph 21 of the complaint except that defendants deny the allegation that plaintiff's second term in the National Guard entitled plaintiff to retired pay benefits.

WHEREFORE, defendants demand dismissal of the plaintiff's complaint, and such other and further relief as the court may deem appropriate.

Dated: Brooklyn, New York

March 11, 1975

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorneys for Defendants
225 Cadman Plaza East
Brooklyn, New York 11201

By:

PAMELA C. MCGUIRE
Assistant U.S. Attorney

TO:

Joan Mangones, Esq.
The Legal Aid Society
56 Bay Street
Staten Island, New York 10301
Att: David Goldfarb, Esq.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 75 C 44

LOUIS J. FIOTO, on behalf of himself and all other persons similarly situated, PLAINTIFFS

—against—

UNITED STATES DEPARTMENT OF THE ARMY; HOWARD C. CALLAWAY, as Secretary of the Army, DEFENDANTS

INTERROGATORIES TO THE UNITED STATES DEPARTMENT OF THE ARMY; HOWARD CALLAWAY AS SECREARY OF THE ARMY

Plaintiff requests that the UNITED STATES DEPARTMENT OF THE ARMY, and/or HOWARD CALLAWAY as SECRETARY OF THE ARMY, by an officer or agent, who shall furnish such information as is available to said Defendants, answer the following interrogatories, separately and fully in writing and under oath, pursuant to Rule 33 of the Federal Rules of Civil Procedures, and that the answers to be signed by the person making them and be served on Plaintiff's attorney thirty (30) days after service of these interrogatories.

In answering these interrogatories furnish all information which is available to you, including information in the possession of your attorneys and not merely such information known of your own personal knowledge.

If you cannot answer the following interrogatories in full, after exercising due diligence to secure the information to do so, so state, and answer to the extent possible, specifying your inability to answer the remainder, and stating whatever information or knowledge you have concerning the unanswered portions.

1. The person or persons answering the following interrogatories will each please state his name, title and business address.

2. State the number of applicants for retirement benefits pursuant to 10 USC 1331(a) received by the Department of the Army each year from 1956 to the present.

3. State the number of persons granted retirement benefits pursuant to 10 USC 1331(a) in each year from 1956 to the present.

4. State the number of persons denied retirement benefits pursuant to the rule in 10 USC 1331(c) for each year from 1956 to the present. List the states in which these persons reside.

5. Of the persons in question 4 above, state the number for each year from 1965 to the present who have 20 years of service as a Reserve or otherwise after August 16, 1945. List the states in which these persons reside.

6. Of the persons in question 4 above, state the number for each year from 1973 to the present who have 20 years of service after July 28, 1953. List the states in which these persons reside.

7. Pursuant to the application for Retired Pay Benefits filed by Plaintiff LOUIS J. FIOTO on 5 September 1967 (DD Form 108) state the amount of Retired Pay

Benefits he would have been entitled to beginning 1 January 1968 if he had not been denied benefits pursuant to 10 USC 1331(c).

Dated: Richmond, New York
February 3, 1975

YOURS &c.
JOAN MANGONES, ESQ.
THE LEGAL AID SOCIETY
56 Bay Street
Staten Island, N.Y. 10301
DAVID GOLDFARB, of Counsel
Attorneys for Plaintiffs
212-273-6677

TO: United States
Department of the Army
Pentagon
Washington, D.C.

Howard Callaway
Secretary of the Army
Pentagon
Washington, D.C.

U.S. Attorney General
Washington, D.C.

U.S. Attorney General
Eastern District, New York
225 Cadman Plaza East
Brooklyn, N.Y. 11201

CIS:PCM:iq
F.#750049

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 75 C 44

LOUIS J. FIOTO, on behalf of himself and all other persons similarly situated, PLAINTIFF

—against—

UNITED STATES DEPARTMENT OF THE ARMY;
HOWARD C. CALLAWAY, as Secretary of the Army,
DEFENDANTS

ANSWERS TO INTERROGATORIES

1. These interrogatories are answered by Pamela C. McGuire, Assistant United States Attorney, of counsel to David G. Trager, United States Attorney for the Eastern District of New York, attorney for defendants in the above-captioned action. The following answers are based on material supplied to the undersigned by Major K. C. Bowden, Chief Support Division, Reserve Components Personnel and Administration Center, St. Louis, Missouri, and by J. E. Boone, Deputy Director, Retired Pay Operations, United States Army Finance and Accounting Center, Indianapolis, Indiana.

2. The defendants are unable to provide the information requested in Interrogatories 2 through 6. Each application for retirement benefits pursuant to 10 U.S.C. § 1331 is processed individually. All applicaions, approvals and denials are filed in the individual personnel folder. No separate tabulation or accounting of the number of applicants or of the number of persons granted or denied benefits is maintained. To provide the information requested in these Interrogatories, the Reserve Components Personnel Administration Center would have to screen several million individual records. Moreover,

many of the relevant records were destroyed in the fire at the National Personnel Records Center in July 1973.

3. From January 1, 1968 until February 28, 1975, the plaintiff would have received Retired Pay Benefits in the amount of $7,973.45 if he had been eligible for those benefits under 10 U.S.C. § 1331.

Dated: Brooklyn, New York
April 1, 1975

PAMELA C. MCGUIRE
Assistant U.S. Attorney

Sworn to before me this
1st day of April, 1975

TO:

Joan Mangones, Esq.
The Legal Aid Society
56 Bay Street
Staten Island, New York 10301

Att: David Goldfarb, Esq.
Of Counsel

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

75 C 44

July 18, 1975

LOUIS J. FIOTO, on behalf of himself and all other persons similarly situated, PLAINTIFFS

—against—

UNITED STATES DEPARTMENT OF THE ARMY;
HOWARD C. CALLAWAY, as Secretary of the Army,
DEFENDANTS

MEMORANDUM AND ORDER

The plaintiff moves for an order pursuant to 28 U.S.C. 2282, and 2284 convening a three judge court, and for an order pursuant to Rule 23(c)(1) of the Federal Rules of Civil Procedure, determining this action to be maintainable as a class action.

It is conceded by the government that the constitutional question presented is substantial. Therefore, it does not object to the convening of a three judge court.

This portion of the motion is granted.

The court will defer to the three judge court the issue whether or not the cause should proceed as a class action.

It is so ordered.

Copies hereof will be forwarded to the attorneys for the parties.

/s/ Walter Bruchhausen
Senior U.S.D.J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 75 C44

(Three Judge Court)

LOUIS J. FIOTO, on behalf of himself and all other persons similarly situated, PLAINTIFFS

—against—

UNITED STATES DEPARTMENT OF THE ARMY; HOWARD C. CALLAWAY, as Secretary of the Army, DEFENDANTS

PLAINTIFF'S STATEMENT UNDER GENERAL RULE 9(g) OF THE MATERIAL FACTS AS TO WHICH THERE EXISTS NO GENUINE ISSUES TO BE TRIED

1. Plaintiff LOUIS J. FIOTO is presenty retired from service in the United States Army. He was born December 9, 1907. Plaintiff served in the United States Coast Guard from 1927 to 1931. He served in the Army National Guard from 1933 to 1940 and again from 1947 to 1967. He received an Honorable Discharge on December 9, 1967 having reached the mandatory age of 60.

2. Plaintiff meets the age and service requirements for Retired Pay for Non-Regular Service pursuant to 10 USC § 1331(a) in that:

(a) he is at least 60 years of age;

(b) he has performed at least 20 years of service computed under Title 10 § 1332;

(c) he performed the last eight years of qualifying service while a member of a regular component, and

(d) he is not entitled under any other provision of law, to retired pay from an armed force or retainer pay as a member of the Fleet Reserve or the Fleet Marine Corps Reserve.

3. Plaintiff performed 20 years of service computed under Title 10 § 1332 between 1947 and 1967.

4. On September 5, 1969 plaintiff filed an application for retired pay for non-regular service pursuant to 10 USC § 1331. The Army denied his application.

5. On May 28, 1974, plaintiff, by his attorney, wrote The Secretary of the Army requesting retired pay benefits be granted. The Department of the Army, Office of the Adjutant General informed plaintiff his request was denied.

6. On June 26, 1974 plaintiff filed an "Application for Correction of Military or Naval Record Under the Provisions of Title 10, U.S. Code, Sec. 1552." The Army Board for correction of military records denied plaintiff's application.

7. Plaintiff has now exhausted all administrative remedies and there is no further appeal he can take within the Department of the Army.

8. The Army's denial of plaintiff's application is based on the fact that although plaintiff meets the criteria of 10 USC § 1331(a), he does not meet the additional criteria of 10 USC § 1331(c) which provides that any person who served in the reserves or national guard before August 16, 1945, is not eligible for retired pay unless they performed active duty in World War I, World War II, or the Korean Conflict.

9. The members of the asserted class are so numerous that joinder of all members is impracticable.

Dated: Richmond, New York
December 3, 1975.

Respectfully submitted,

JOAN MANGONES, ESQ.
THE LEGAL AID SOCIETY
42 Richmond Terrace
Staten Island, N.Y. 10301
212-273-6677
DAVID GOLDFARB, of Counsel
Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

No. 75 C 44

[Filed in Clerk's Office, U.S. District Court E.D. N.Y., Jan. 12, 1976]

January 12, 1976

LOUIS J. FIOTO, on behalf of himself and all other persons similarly situated, PLAINTIFFS

—against—

UNITED STATES DEPARTMENT OF THE ARMY; HOWARD C. CALLAWAY, as Secretary of the Army, DEFENDANTS

MEMORANDUM AND ORDER

BRUCHHAUSEN, D. J.

In consideration of plaintiff's motion, dated June 4, 1975, for class action certification, pursuant to Rule 23 (b) (2) of the Federal Rules of Civil Procedure, it is hereby

Ordered and decreed that the plaintiff's motion is granted.

Due to the limited jurisdiction of three-judge courts, as set forth by the Supreme Court in Hagans v. Lavine, 415 U.S. 538, 543-45 (1974), the question of class action certification has been considered by this court, rather than by the three-judge court convened to hear the constitutional issues in this case. 28 U.S.C. § 2284(5).

/s/ Walter Bruchhausen
Senior U. S. D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 75 C 44

[Filed in Clerk's Office, S. District Court, E.D., N.Y., May 3, 1976]

LOUIS J. FIOTO, on behalf of himself and all other persons similarly situated, PLAINTIFFS

—against—

UNITED STATES DEPARTMENT OF THE ARMY; HOWARD C. CALLAWAY, as Secretary of the Army, DEFENDANTS

ORDER

Defendants having moved by notice of motion dated April 21, 1967 for a stay of the judgment pending appeal to the United States Supreme Court, it is hereby ORDERED and DECREED that the motion is granted.
Dated: April 30, 1976

/s/ J. Edward Lumbard
J. EDWARD LUMBARD
U.S.D.J.

/s/ Walter Bruchhausen
WALTER BRUCHHAUSEN
U.S.D.J.

/s/ Henry Bramwell
HENRY BRAMWELL
U.S.D.J.
A True Copy
Attest
Dated May 11, 1976
LEWIS ORMEL

BY Frank [Illegible]
Deputy Clerk

CIS:JCJ:es
File No. 750049

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

Civil Action No. 75 C 44

LOUIS J. FIOTO, on behalf of himself and all other persons similarly situated, PLAINTIFFS

—against—

UNITED STATES DEPARTMENT OF THE ARMY, HOWARD C. CALLAWAY, as Secretary of the Army, DEFENDANTS

NOTICE OF MOTION

SIR:

PLEASE TAKE NOTICE that upon the annexed affidavit of JOSEPH E. GLEASON, Director of the Retired Activities Directorate of the United States Army, the defendants will move this Court before the honorable three-judge court previously convened herein, in the United States Courthouse for the Eastern District of New York, 225 Cadman Plaza East, Brooklyn, New York on the 7th day of May, 1976, at 10:00 o'clock in the forenoon of that day, or at such other time and place as the Court may designate, for an order pursuant to Rule 62 of the Federal Rules of Civil Procedure staying the judgment of this Court with respect to members of the class certified herein pending defendants' direct appeal to the United States Supreme Court.

Dated: Brooklyn, New York
April 21, 1976

Yours, etc.,

DAVID G. TRAGER
United States Attorney
Eastern District of New York
Attorney for Defendants
225 Cadman Plaza East
Brooklyn, New York 11201

By: J. Christopher Jensen
J. CHRISTOPHER JENSEN
Assistant U.S. Attorney

TO:

DAVID GOLDFARB, ESQ.
Attorney for Plaintiffs
Legal Aid Society
Staten Island
Neighborhood Office
42 Richmond Terrace
Staten Island, New York 10201

SUPREME COURT OF THE UNITED STATES

No. 75-1704

MARTIN R. HOFFMANN, Secretary of the Army,
APPELLANT

v.

LOUIS J. FIOTO, ETC.

APPEAL from the United States District Court for the Eastern District of New York.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

October 4, 1976

SUPREME COURT OF THE UNITED STATES

No. 75-1704

MARTIN R. HOFFMANN, Secretary of the Army,
APPELLANT

v.

LOUIS J. FIOTO, ETC.

ON CONSIDERATION of the motion of the appellee for leave to proceed herein in forma pauperis,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

October 4, 1976

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 223857 17

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1704

MARTIN R. HOFFMANN, SECRETARY OF THE ARMY,

APPELLANT,

v.

LOUIS J. FIOTO, et al.

APPELLEE.

ON APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

MOTION TO AFFIRM

Appellee, pursuant to Rule 16(1)(d) of the Rules of the Supreme Court of the United States, moves that the final judgment and order of the District Court be affirmed on the ground that the decision of the District Court is so obviously correct as to warrant no further review by this Court.

OPINION BELOW

The opinion and judgment of the District Court are set forth in Appendices A, B, and C of appellant's jurisdictional statement.

JURISDICTION

The jurisdictional requisites are set forth in appellant's jurisdictional statement.

QUESTION PRESENTED

Whether 10 USC §1331(c) of the Army and Air Force Vitalization and Retirement Equalization Act of 1948, on its

face and as applied to plaintiff and his class is unconstitutional as violative of the Due Process Clause of the Fifth Amendment in excluding from eligibility for retirement pay persons who served twenty years of satisfactory service after August 16, 1945 and satisfied all requirements for such retirement pay except that they had also been members of the National Guard or the Reserve prior to August 16, 1945, and had not served on active duty during World War I, World War II or the Korean Conflict.

STATUTE INVOKED

Pertinent provisions of 10 USC §1331 are set forth in appellant's Jurisdictional Statement at pages 2 and 3.

STATEMENT

The Army and Air Force Vitalization and Retirement Equalization Act of 1948, 62 Stat. 1081, as amended, 10 USC §1331 et seq., grants retired pay for reservists and national guardsmen who meet certain age and service requirements including the requirement that they have reached 60 years of age and have served 20 years as computed under the service and point system of §1332. The challenged proviso at 10 USC §1331(c) sets forth the additional eligibility requirement that any reservist or guardsmen who has years of service before August 16, 1945 must also have performed active duty during either World War or the Korean Conflict; otherwise that person is completely disqualified from receiving retirement benefits to which he is otherwise entitled.

Appellee Fioto is presently retired from service in the United States Army. Appellee served in the United States Coast Guard from 1927 to 1931. He served in the Army National Guard from 1933 to 1940 and again from 1947 to 1967. He received an Honorable Discharge on December 9, 1967, having reached the mandatory age of 60.

On September 5, 1967, appellee filed an application for retired pay for non-regular service pursuant to 10 USC §1331(a). The Army denied his application. By letter dated September 25, 1974, the Army Board of Correction of Military Records denied appellee's final application.

Appellee then commenced this action for declaratory and injunctive relief in the United States District Court for the Eastern District of New York, seeking class certification and the convening of a three-judge court.

Judge Bruchhausen as the convening judge, entered an order certifying a class. The class consists only of those reservists who have twenty years of qualifying service after August 16, 1945, as computed under the standards in 10 USC §1332,and are otherwise entitled to retired pay, except that because they have additional years of reserve service before August 16, 1945, and did not perform active wartime duty they are disqualified from receiving benefits by reason of 10 USC §1331(c). 1/

The three-judge court, per Circuit Judge Lumbard, granted appellee's motion for summary judgment holding that as applied to plaintiff and the members of his class §1331(c) violates the minimum requirements imposed by the Due Process Clause of the Fifth Amendment. (District Court Decision, Appellant's Appendix at 5a.)

The District Court found that Congress had not intended to create a purely arbitrary distinction between those who had pre-1945 service and those who had not, but rather had "adopted the reasonable requirement that an individual serve twenty 'satisfactory' years, as measured by an objective standard." (Id. at 6a, fn. omitted.) The Court observed

1/ See opinion of the District Court fn. 1 as amended (Appellant's Jurisdictional Statement, Appendix B, at 9a). Of course, the particular reason why appellee Fioto, or any other member of the class, did not serve on active duty is not a question common to the class and is not relevant to the Constitutional question herein.

that the objective standard is the 50 point per year system set forth at 10 USC §1332. Prior to the passage of the Bill there was no way to determine a "satisfactory" year. Congress sought to discount the years prior to World War II where there was no way to measure whether service was "satisfactory." "An understandable exception was provided for those who had seen active duty during one of the World Wars." (Id. at 7a.) The Court thus concluded that Congress never intended additional pre-1945 service to be a perpetual bar to benefits.

As is noted in the decision below, it is undisputed that if appellee Fioto's service in the National Guard had been limited to years 1947 to 1967, he would be entitled to retirement pay. The Court found that the challenged proviso is unconstitutional and that Fioto's earlier service from 1933 to 1940 could not constitutionally bar him from all benefits.

ARGUMENT

The Court below correctly concluded that appellee and his class are being denied the equal protection of the law because without rational basis they are denied eligibility for retired pay which is given to others with the same twenty years of satisfactory service after 1945. This discrimination is not rationally related to any legitimate congressional goal.

This Court has made it clear that the determination of the constitutionality of an Act of Congress must be made in light of the actual purpose of Congress. Jimenez v. Weinberger, 417 US 628, 636, 94 S. Ct. 2496, 2501, 41 L. Ed. 2d 363 (1974), Weinberger v. Wiesenfeld, ___ US ___, 43 L. Ed. 2d 514 (1975). The challenged proviso in 10 USC §1331(c) can not pass constitutional muster because it bears no rational relation to the actual legislative goal of the Act.

After analysis of the legislative history the District Court correctly found that Congress' actual purpose was to provide benefits to those who had satisfactorily served twenty years, thus creating an incentive to continued service. (Appellant's Appendix at 6a.)

The original House Bill intended to confer a benefit and act as inducement to Reserve Service. Hearings on H. R. 2744 before the Senate Committee on Armed Services, 80th Cong. 2d Sess. 13 (1948). The Senate in its amendments set out criteria for 20 years of satisfactory service, but never intended to change the purpose of the House Bill to confer the benefit upon a person who served those 20 years:

> The amendments that are suggested to the bill since it passed the House are all perfecting amendments; none of them change the intent or purposes of the bill as it passed the house.
>
> Statement of Col. Melvin J. Mass, id. at p. 23.

The Senate amendments in general were aimed at defining "satisfactory" service. [2/] This is illustrated by the June 8, 1948, testimony of J. M. Chambers, member of the Committee staff:

> Mr. Chambers. Senator Maybank, perhaps we can best put it this way: Whereas legally it was possible under the House Bill, although I am sure it was never the intent, for persons to qualify practically by doing no service at all the Senate Bill actually requires a tremendous amount of service in the Reserve to qualify for this reserve retirement.
>
> The plan differs markedly from the House in this degree, that each of them require 20 years of so-called satisfactory service. The House version left the term "satisfactory" to be defined by regulations. We have written into this law,

---

2/ The objective standards for satisfactory service chosen by Congress are set forth in 10 USC §1332, the District Court sets them forth at fn. 6 (Appellant's Appendix A at 6a.)

and the Reserves have agreed to it, certain standards which are going to be extremely difficult to meet, and these are spelled out in the law.

Id., May 27, 1948, at p. 66.

The Senate amendments, created a system in futuro to measure reserve service in each year and determine whether it was satisfactory. That involved earning 50 qualifying points in each year after 1948. However, the intent of the bill was not to exclude anyone who had 20 years of satisfactory service and in addition had some years of service that were not satisfactory. If an individual missed 50 points in a year he could always obtain them in another year. All that was intended to be required of anyone was 20 years of satisfactory service achieved at some point during his career:

> Sen. Saltonstal. Just to supplement what you say, a man today has got to get 50 points a year for 20 years. If he misses out through sickness or anything else, in any 1 year, in attaining his 50 points he is out of luck on his retirement. Am I correct.
>
> Mr. Chambers. That is correct. He is out of luck insofar as that one year is concerned.
>
> Senator Hill. He could pick it up?
>
> Mr. Chambers. He could serve another year of satisfactory service. When he has acquired 20 years of satisfactory service he would be qualified.

Id. at p. 67.

This is most important. Missing years of satisfactory service was not intended to disqualify:

> Mr. Chambers. ...He would get credit for the points if he got ultimately 20 years of service. A man comes into the reserve at age 25. When he reaches age 45 he has only got 15 years of satisfactory service because for 5 years he was very inactive. He can stay in 5 years longer if he is not forced out by this attrition system, and make up those 5 years which he lost while he was out.

Id., June 8, 1948, at p. 70.

The Senate had no way to measure past service -- service before the 50 point system was created. So they used a criteria of active wartime duty for pre-1945 service:

> Gen. Dahlquist. To qualify for the future, a year of satisfactory service, the man has to have 50 points....
>
> Senator Byrd. How about the past, Sir?
>
> Gen Dahlquist. The past, he gets credit for that as our records show that he was a satisfactory reserve officer; he gets credit for each year that he was a reserve officer.
>
> ******
>
> Senator Maybank. If they have not been in the war, you said they did not get credit.
>
> Gen. Dahlquist. That is right....

Id. at p. 69.

Wartime service was made a criteria for pre-1945 reserve service because there was no other system to judge year by year if service was satisfactory. But as Judge Lumbard noted for the Court below, there is not a shred of evidence to indicate that Congress intended to disqualify any man with 20 years of satisfactory service after 1945. Clearly Congress intended that a reservist who missed the criteria for satisfactory service before 1945 would make it up after 1945 thereby placing him on equal footing with the post-1945 reservist, who can make up any year where he does not have 50 points.

As the District Court concluded, Congress in 1948 never contemplated the possibility of a man who has 20 years of measurable satisfactory service after 1945, and also having reserve service before 1945. If Congress did consider him, there is no reason to assume it would not have given him the same opportunity as other reservists to pick up additional satisfactory years and thereby qualify for benefits.

The bar to benefits imposed on plaintiff and plaintiff class by the challenged proviso was the consequence of legislative oversight. The intent of the bill and amendments was to create criteria for the equalization of retirement benefits for all personnel. The criteria for reservists was meant to be 20 years of satisfactory service.

> Senator Maybank. I want the information for the record. There is no discrimination whatsoever in this bill against any enlisted man, he need not be promoted or anything else, so long as he carries out his 20 years and earns his 50 points.
>
> Id. at p. 67.

General Dahlquist's quote in Appellant's Jurisdictional Statement fn. 7 at 9, is not inconsistent with the Congressional purpose as set forth above. Years of service by a pre-1945 reservist who did not fight in a war would not qualify him for benefits. However, as the Court below emphasizes, those additional years of pre-1945 service could not act as a perpetual bar.

Johnson v. Robison, 415 US 361 (1974),the sole case relied upon by appellant,is inapposite here. In that case, this Court sustained the constitutionality of Congress' distinction between military service and alternative service for purpose of eligibility for educational benefits because it was rational in light of the express Congressional purpose to make the distinction (415 US at 376). In sharp contrast the discrimination worked by the proviso involved here actually defeats the purpose of Congress, as the District Court correctly concluded and is amply demonstrated above.

For these reasons, appellee submits, that the judgment and order of the District Court should be affirmed without further review by this Court. 3/

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3/ Appellant argues that the District Court lacked jurisdiction under the Tucker Act, 28 USC §1346, to award a monetary judgment against the Secretary and further if it had jurisdiction there is doubt whether sovereign immunity was waived because no Act of Congress created a substantive right to retroactive retired pay.

First, the District Court did not rely on the Tucker Act for jurisdiction but rather on 28 USC §1361. Second, unlike U. S. v. Testan, No. 74-753, relied on by appellant, where there was no specific statute giving respondent the benefit of a position he had not been appointed to, here the statute relied upon, 10 USC §1331,grants retirement benefits to appellee and his class but for the proviso which is challenged as unconstitutional. Furthermore, the statute sets the entitlement date for benefits: "(e) Notwithstanding Sec. 8301 of Title 5, United States Code, the date of entitledment to retired pay under this section shall be the date on which the requirements of subsection (a) have been completed." (Emphasis added.) Therefore, once 10 USC §1331(c) was held unconstitutional as applied, the Secretary of the Army must grant appellee and his class retirement benefits as of the date they qualify.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-1704

MARTIN R. HOFFMANN, SECRETARY OF THE ARMY,

APPELLANT,

v.

LOUIS J. FIOTO, et al.

APPELLEE.

MOTION FOR LEAVE TO FILE MOTION
TO AFFIRM IN UNPRINTED FORM AND
TO PROCEED IN FORMA PAUPERIS

Pursuant to Rule 53, Paragraph I, of the Rules of this Court, motion is hereby made that the appellee be allowed to file his motion to affirm in unprinted form and to proceed in forma pauperis for the reasons stated in the attached affidavit of appellee.

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AFFIDAVIT IN SUPPORT OF MOTION FOR LEAVE
TO FILE MOTION TO AFFIRM IN UNPRINTED
FORM AND TO PROCEED IN FORMA PAUPERIS

I, LOUIS J. FIOTO, being first duly sworn, depose and say, in support of my motion for leave to file my motion to affirm in unprinted form and to proceed in this case without being required to prepay costs and fees:

1. I am the appellee in the above-entitled case.

2. The sole sources of income of me and my family are my Social Security benefits and retired pay benefits received as a result of this action. Because of my poverty I am unable to pay the costs involved in the case or give security therefor and still be able to provide myself and my dependents with the necessities of life.

3. The moneys recovered as a result of this action have been entirely used to repay debts acquired when I was not receiving retired pay benefits.

4. I believe that I am entitled to the redress I seek in said case.

5. The nature of said case is briefly stated as follows: I commenced this action in the United States District Court for the Eastern District of New York, on behalf of myself and others similarly situated seeking a judgment declaring unconstitutional 10 USC §1331(c) on its face and as applied as

violative of my constitutional right to equal protection; seeking a judgment enjoining appellant from applying 10 USC §1331(c) to me or my class; and seeking a judgment directing appellant to grant us retirement benefits pursuant to 10 USC §1331(a). District Judge Bruchhausen convened a Three-Judge Court to hear the constitutional claims presented herein. By judgment dated January 23, 1976, the Court granted my motion for summary judgment and denied appellants' cross-motion for summary judgment. The question presented on this appeal is whether the challenged provision of the Army and Air Force Vitalization and Retirement Equalization Act of 1948, on its face and as applied is unconstitutional in excluding from eligibility for retirement pay those who had met the requirements and served twenty measurable years of satisfactory service after August 16, 1945, but who had also been members of the National Guard or the Reserve prior to August 16, 1945, and had failed to serve on active duty during either World War.

Louis J. Fioto
LOUIS J. FIOTO

Sworn to before me this
31st day of June, 1976.
David Goldfarb

DAVID GOLDFARB
Notary Public, State of New York
No. 43-9022059
Qualified in Richmond County
Commission Expires March 30, 1978

No. 75-1704

In the Supreme Court of the United States

OCTOBER TERM, 1976

MARTIN R. HOFFMANN, SECRETARY OF THE ARMY,
APPELLANT

v.

LOUIS J. FIOTO, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

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In the Supreme Court of the United States

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v.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT

OPINION BELOW

The opinion of the district court (J.S. App. A, pp. 1a–8a), which was later amended (J.S. App. B, pp. 9a–10a), is reported at 409 F. Supp. 831.

JURISDICTION

The judgment of the three-judge district court, holding unconstitutional and in effect enjoining enforcement of 10 U.S.C. 1331(c) as it applies to the named appellee and the class he represents, was entered on January 26, 1976 (J.S. App. C, pp. 11a–12a). A notice of appeal to this Court was filed on Febru-

ary 25, 1976 (J.S. App. D, pp. 13a–14a). On April 19, 1976, Mr. Justice Marshall extended the time for docketing the appeal to and including May 25, 1976. The jurisdictional statement was filed on May 24, 1976, and probable jurisdiction was noted on October 4, 1976 (App. 42). The jurisdiction of this Court is conferred by 28 U.S.C. 1252 and 1253.

QUESTION PRESENTED

Whether Congress, when it established in 1948 a program of retirement pay for nonregular military service, acted constitutionally in excluding from eligibility for such retirement pay individuals who had been members of the National Guard or the Reserve before August 16, 1945, but had failed to serve on active duty during either World War.[1]

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall * * * be deprived of * * * property, without due process of law * * *.

Section 302 of the Army and Air Force Vitalization and Retirement Equalization Act of 1948, 62 Stat. 1087, as amended, 10 U.S.C. 1331, provides in pertinent part:

[1] If, contrary to the position taken in this brief, the Court holds that the statutory exclusion is unconstitutional, a further question is presented concerning the power of the district court to enter a judgment against the Secretary of the Army for retirement pay retroactive to the date of retirement. For reasons that are explained below (pp. 21–25, *infra*), however, that question should first be considered by the district court on remand.

> (a) Except as provided in subsection (c), a person is entitled, upon application, to retired pay computed under section 1401 of this title, if—
>
> (1) he is at least 60 years of age;
>
> (2) he has performed at least 20 years of service computed under section 1332 of this title;
>
> (3) he performed the last eight years of qualifying service while a member of any category named in section 1332(a)(1) of this title, but not while a member of a regular component, the Fleet Reserve, or the Fleet Marine Corps Reserve; and
>
> (4) he is not entitled, under any other provision of law, to retired pay from an armed force or retainer pay as a member of the Fleet Reserve or the Fleet Marine Corps Reserve.
>
> * * * * *
>
> (c) No person who, before August 16, 1945, was a Reserve of an armed force, or a member of the Army without component or other category covered by section 1332(a)(1) of this title except a regular component, is eligible for retired pay under this chapter, unless he performed active duty after April 5, 1917, and before November 12, 1918, or after September 8, 1940, and before January 1, 1947, or unless he performed active duty (other than for training) after June 26, 1950, and before July 28, 1953.

STATEMENT

1. The Army and Air Force Vitalization and Retirement Equalization Act of 1948, 62 Stat. 1081, as

amended, 10 U.S.C. 1331 *et seq.*, established a program of retirement pay for nonregular military serviceman, *i.e.*, reservists and national guardsmen, who satisfy certain age and service requirements. In general, the Act provides retirement pay to individuals who have reached the age of 60 and have performed at least 20 years of qualifying service. 62 Stat. 1087, 10 U.S.C. 1331(a).[2] However, the Act excluded from eligibility any individual who, before August 16, 1945, was a member of the nonregular military service "unless he performed active duty after April 5, 1917, and before November 12, 1918, or after September 8, 1940, and before January 1, 1947." 70A Stat. 102, 10 U.S.C. (1952 ed., Supp. IV) 1331(c); see 62 Stat. 1087–1088.

Thus, as originally enacted, the Act excluded from eligibility for retirement pay individuals who had been members of the nonregular military service before August 16, 1945, but had failed to serve on active duty during either World War. The Act was subsequently amended in 1958 to remove the eligibility bar for such individuals if they had later served on active duty during the Korean War. 72 Stat. 702, 10 U.S.C. 1331(c).

2. The named appellee, Louis J. Fioto, served in the United States Army National Guard for seven

[2] An individual's years of qualifying service are computed by adding the number of years of service performed before July 1, 1949, in one of several specified armed forces, reserve, or militia units, to the number of one-year periods after July 1, 1949, in which the individual has been credited with at least 50 points pursuant to a statutorily prescribed system that, in general, measures the extent of an individual's participation in military service. 10 U.S.C. 1332.

years prior to 1945 (from 1933 to 1940), but he did not serve on active duty during either World War (App. 5, 15–16).[3] Fioto rejoined the National Guard after the end of World War II and served for slightly more than 20 years, until his honorable discharge in 1967, but he did not serve on active duty during the Korean War (App. 11, 13, 15–16).

Relying on this nonregular military service, Fioto applied to the Department of the Army for retirement pay benefits in 1967 and again in 1974 (App. 13, 21–22). On both occasions his application was denied on the basis of the Act's explicit exclusion of individuals such as Fioto from eligibility for retirement pay (App. 15–16, 27, 37).[4]

Following the denial of his second application, Fioto commenced this action in the United States District Court for the Eastern District of New York, on behalf of himself and others similarly situated, seeking injunctive relief and a money judgment for

[3] The opinion of the district court states that Fioto's failure to serve in World War II was "[d]ue to injuries resulting from an automobile accident in 1941 * * *" (J.S. App. A, p. 2a). There is, however, no support for this statement in the record. Furthermore, Fioto's Army personnel record, which was not introduced in evidence but relevant parts of which we have lodged with the Clerk of the Court, shows that when Fioto reenlisted in the National Guard in 1947, and periodically thereafter, he attested, subject to the sanctions imposed by 18 U.S.C. 1001, that he had never been rejected for military service for medical reasons and had never been hospitalized (except in 1949) as a result of an accident. Moreover, an alleged automobile accident in 1941 would not explain Fioto's withdrawal from the National Guard in 1940.

[4] The latter denial was by the Army Board for the Correction of Military Records in September 1974 (App. 27).

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retirement pay retroactive to the date of his retirement, on the ground that the eligibility bar of 10 U.S.C. 1331(c) "violate[s] equal protection principles of the Due Process Clause of the Fifth Amendment" (App. 9). The action was certified as a class action pursuant to Rule 23, Fed. R. Civ. P.,[5] and a three-judge court was convened under 28 U.S.C. 2282 (App. 35).

On cross-motions for summary judgment, the district court held that, as applied to Fioto and the class he represents, 10 U.S.C. 1331(c) violates the requirements of equal protection inherent in the Due Process Clause of the Fifth Amendment (J.S. App. A, p. 5a). The court reasoned that the application of the statutory eligibility bar to appellee and the other members of the class "bears no rational relationship to the legislative objectives which led to the enactment of [the Act]" (*ibid.*).[6]

The court ordered that Fioto "henceforth be placed on the Army's retirement rolls" (J.S. App. C, p. 12a) and be paid "all retirement benefits which have accrued since his honorable discharge and which have

[5] The class was defined as all "persons at least 60 years of age who have performed 20 years of service computed under 10 U.S.C. § 1332 since August 16, 1945 and otherwise are entitled to retired pay for nonregular military service, except that before August 16, 1945 they were a Reserve of an armed force or a member of the Army without component and did not perform active duty after April 15, 1917 but before November 12, 1918, or after September 8, 1940 and before January 1, 1947, or after June 26, 1950 but before July 28, 1953, and therefore were disqualified from Retired Pay Benefits by virtue of 10 U.S.C. § 1331(c)" (J.S. App. B, p. 9a).

[6] The court also observed that "[t]here is simply no evidence in the legislative history that Congress intended that any pre-1945 service would create a perpetual bar to future benefits" (J.S. App. A, p. 7a; see *id.*, App. B, p. 10a).

been denied him under the Army's erroneous ruling * * *" (*ibid.*). The court further ordered the Secretary to place all members of the class on the Army's retirement rolls and to grant them retirement benefits (*ibid.*).[7]

SUMMARY OF ARGUMENT

This case presents the question whether Congress, when it established a program of retirement pay for nonregular military personnel in 1948, violated the Due Process Clause of the Fifth Amendment by excluding individuals who had been in the militia prior to August 16, 1945, and had not served on active duty during wartime, from eligibility to earn retirement pay. Since there is no suggestion here that the statutory classification at issue is "suspect" or bears upon a fundamental constitutional interest, the appropriate inquiry is whether Congress acted rationally with respect to a permissible legislative purpose. See, *e.g.*, *Weinberger* v. *Salfi*, 422 U.S. 749, 768–769; *Richardson* v. *Belcher*, 404 U.S. 78, 81, 84; *Johnson* v. *Robison*, 415 U.S. 361, 374. The statutory classification challenged here is constitutional under that standard.

When Congress established the program of retirement pay for nonregular military personnel, its principal purpose was to encourage younger men and men

[7] It is not entirely clear whether the district court's judgment with respect to the unnamed members of the class requires the payment of retirement pay retroactive to the date of retirement. The order states in pertinent part (J.S. App. C, p. 12a) "that the Secretary of the Army place all others in [appellee] Fioto's class on the Army retirement rolls and grant them retirement benefits accordingly," but the order does not state whether it is to be given retroactive effect. Appellee Fioto is currently being paid under the court's order, but the court has stayed its order with respect to the class (App. 39–41).

with wartime experience to enlist or reenlist in the National Guard or Reserve, for the services of such men in the post-war militia were believed essential to the nation's military preparedness In addition, Congress wished to show the nation's gratitude to those reservists and guardsmen who had served on active duty during one or both of the World Wars.

These underlying rationales did not support extending the opportunity to earn retirement pay to appellees, who had been in the nonregular military service before or during World War II but had failed to serve on active wartime duty. Such individuals possessed neither the youth nor the wartime experience that Congress sought in post-war militiamen. Congress thus had no reason either to encourage appellees' renewed or continued enlistment in the nonregular military service or to reward them for past wartime service. Since the exclusion of appellees from participation in the retirement pay program had a legitimate and rational basis, it should be sustained as constitutional.

ARGUMENT

CONGRESS, WHEN IT ESTABLISHED IN 1948 A PROGRAM OF RETIREMENT PAY FOR NONREGULAR MILITARY SERVICE, ACTED CONSTITUTIONALLY IN EXCLUDING FROM ELIGIBILITY FOR SUCH RETIREMENT PAY INDIVIDUALS WHO HAD BEEN MEMBERS OF THE NATIONAL GUARD OR THE RESERVE BEFORE AUGUST 16, 1945, BUT HAD FAILED TO SERVE ON ACTIVE DUTY DURING EITHER WORLD WAR

There can be no question but that appellee Fioto and the class he represents are ineligible for participation in the program of nonregular military retirement pay established by the Army and Air Force Vitalization and Retirement Equalization Act of 1948. Fioto and the unnamed appellees were members of the Reserves or National Guard before August 16, 1945, but they had not served on active duty during either World War. They therefore are expressly barred from eligibility for retirement pay by the unambiguous language of 10 U.S.C. 1331(c):

> No person who, before August 16, 1945, was a Reserve of an armed force * * * is eligible for retired pay under this chapter, unless he performed active duty after April 5, 1917, and before November 12, 1918, or after September 8, 1940, and before January 1, 1947 * * *.

In holding this provision unconstitutional, the district court proceeded upon the assumption that the statutory exclusion was merely an inadvertent drafting error. Its opinion was based upon an expressed belief that Congress had not intended to bar individuals like Fioto from receiving retired pay altogether but rather had intended only to prohibit them from using pre-1945 service to satisfy the statutory requirement of 20 years' service. See J.S. App. A, pp. 6a–7a. But that belief was grounded, in major part, in a misreading of an insignificant fragment of the legislative history. The court relied upon the statement of a Senate committee staff member that a hypothetical member of the nonregular military service, who in a given year may not have accumulated sufficient "points" to obtain credit for a full year of service (see note 2, *supra*), "would get credit for the points if he got ulti-

mately 20 years' service."[8] Hearings on H.R. 2744 before the Senate Committee on Armed Services, 80th Cong., 2d Sess. 70 (1948) (quoted at J.S. App. A, p. 7a). But the court overlooked the fact that that statement was made solely with respect to a hypothetical reservist or guardsman who had "served 20 years *and served in World War I or II*" (*Senate Hearings, supra,* at 70; emphasis added).[9] The staff member's statement did not apply, and was not intended to apply, to members of the appellee class.

The district court's conclusion that the statutory exclusion "is at odds with Congress' clear purposes and goals in enacting the statutory scheme" (J.S. App. A, p. 8a) also rested on its inability to find any evidence in the legislative history that Congress intended to exclude the appellee class from eligibility to earn retirement pay on the basis of post-1945 service (*id.* at 7a). The unambiguous statutory text, however, constitutes sufficient evidence of that intent.

There is evidence in the legislative history as well that Congress intended the result that its choice of language achieved. For example, in recommending

[8] The staff member's statement refers to the fact that points earned in addition to those required to achieve eligibility for retirement pay under 10 U.S.C. 1331(a)(2) would be credited to the serviceman for the purpose of computing the amount of retirement pay he would receive. See 10 U.S.C. 1333(3) and 1401.

[9] Furthermore, the district court apparently read the staff member's statement as suggesting that, in the computation of retirement benefits, appellees should be entitled to credit for pre-1945 service upon completion of 20 years' post-1945 service. But the point system to which the statement refers pertains only to service after July 1, 1949 (see note 2, *supra*); the statement necessarily had no relevance to pre-1945 service.

that Congress adopt the statutory exclusion challenged here, Major General John E. Dahlquist, the Deputy Chief of the Army Chiefs of Staff, advised the Senate Committee on Armed Service (Senate Hearings on H.R. 2744, *supra,* at 29):

> The purpose of reservists was to fight in the war. If he did not fight in the wars we did have, we feel he should not qualify.

The Committee explicitly endorsed this view. The Committee Chairman, Senator Chan Gurney, explained (*id.* at 77):

> That [statutory exclusion] * * * make[s] certain that no one who drops out of the Reserves to avoid service in the war is qualified under the bill. This is concurred in by the services and the Reserves.

Thus the statutory exclusion challenged by appellees was not unintended or inadvertent.

This conclusion is confirmed by the 1958 amendment to the Act. That amendment lifted the eligibility bar for those otherwise excluded militiamen who, unlike appellees, performed active duty during the Korean War. See S. Rep. No. 2188, 85th Cong., 2d Sess. 1–2, 3 (1958); H.R. Rep. No. 1984, 85th Cong., 2d Sess. 2, 3 (1958); Hearings on Sundry Legislation Affecting the Naval and Military Establishment (H.R. 781) before the House Committee on Armed Services, 85th Cong., 2d Sess. 7899, 7900 (1958). Congress recognized that individuals who had been militiamen before August 16, 1945, and had later served on active duty in the Korean War should be eligible to earn retirement pay since they "gener-

ally would have been subjected to the same hardships and hazards that were experienced by persons who served during World War I and World War II." S. Rep. No. 2188, *supra,* at 2; H.R. Rep. No. 1984, *supra,* at 3; House Hearings on H.R. 781, *supra,* at 7897. Thus Congress well understood that, in the absence of any remedial legislative action, that group of Korean War veterans would continue to be ineligible for participation in the retirement pay program. By the same token, Congress obviously understood that the appellee class remained excluded from that program.[10]

Thus there is no foundation for the district court's assumption that Congress did not mean what it said in enacting the statutory exclusion in 10 U.S.C. 1331(c). Congress knew what it was doing and did it intentionally.

It also is clear, for the reasons we elaborate below (pp. 13–21, *infra*), that Congress had a legitimate and rational basis for enacting the statutory exclusion. In a case such as this, due process requires no more: the principles of equal protection that inhere in the Due Process Clause of the Fifth Amendment permit the different treatment of different classes of individuals so long as "the goals sought are legitimate, and the classification adopted is rationally related to the achievement of those goals * * *." *Richardson* v. *Belcher,* 404 U.S. 78, 84. See also, *e.g., Weinberger* v.

[10] Indeed, Congress has recently considered and failed to act upon several proposals that would have removed the eligibility bar for members of the appellee class. See S. 117, H.R. 5253 (94th Cong., 1st Sess.); cf. H.R. 4104 (94th Cong., 1st Sess.).

Salfi, 422 U.S. 749, 768–769; *Johnson* v. *Robison,* 415 U.S. 361, 374.

A. THE ACT'S PRINCIPAL PURPOSE WAS TO ENCOURAGE YOUNGER MEN AND MEN WITH WARTIME EXPERIENCE TO ENLIST AND REENLIST IN THE MILITIA, AND THE EXTENSION OF ELIGIBILITY FOR RETIREMENT PAY TO APPELLEES WOULD NOT HAVE FURTHERED THAT PURPOSE

Congress' overriding purpose in enacting the 1948 Act was to preserve the militia as an effective secondary fighting force that would be available for immediate activation in time of military need. To achieve that end, it was necessary to make the militia attractive both to men with wartime experience and to the newer generation of men who had been too young to serve during World War II. The program of retirement pay was designed to meet the recruitment needs of the nation's militia by providing an incentive for those men, wartime veterans and the young, to enlist or reenlist.

The district court ascribed a somewhat broader purpose to the Act. It stated that Congress' purpose in establishing a program of retirement pay for nonregular military service was to extend to all militiamen an undifferentiated "incentive to continued service" and thereby "to limit the anticipated post-war exodus from the Reserves and National Guard" (J.S. App. A, p. 6a). But by positing such a broad legislative purpose in such generalized terms the court obscured the basis for the statutory provision under consideration here, which expressly excludes certain individuals from eligibility for participation in the retirement pay program. That Congress did enact the eligibility bar in 10 U.S.C. 1331(c) reveals that its interest in providing a recruitment incentive was

more particularized than that attributed to it by the court.

The legislative history of the Act confirms that Congress desired particularly to encourage enlistments in the militia by younger men and those with wartime experience. The sponsor of the legislation, Congressman Brooks, specifically recognized the importance of providing an incentive for military training by "young men just coming out of the colleges." 94 Cong. Rec. 2495 (1948); see also Hearings on Sundry Legislation Affecting the Naval and Military Establishment (H.R. 2744) before a Subcommittee of the House Committee on Armed Services, 80th Cong., 1st Sess. 3312 (1947). The congressional debates also revealed Congress' awareness of the need "to encourage our young veterans to stay in or join up with the National Guard or the Army and Air Force Reserves," since "[t]hey will enrich these services with their skill and experience for many years to come." 94 Cong. Rec. 2490 (Congressman Miller). As Colonel Melvin J. Maas of the United States Marine Corps Reserve advised the Senate Committee on Armed Services (Senate Hearings on H.R. 2744, *supra,* at 23):

> The necessity for this legislation is urgent. The enlistments of hundreds of thousands of our present reservists, already trained with actual wartime experience, begin expiring this year. There is no inducement for them to reenlist at present. We have a formidable backlog, war-trained Reserves, in being now. It behooves us to take vigorous steps immediately to retain that Reserve before it disintegrates. If

> we lose that force now, we may not have time at our disposal to replace it later. * * *

See also House Hearings on H.R. 2744, *supra,* at 3304, 3308, 3453, 3460.

Older individuals, like appellee Fioto, who had never seen active wartime duty were reasonably regarded as being potentially less useful as soldiers in the event of wartime activation. Fioto and the other members of the class he represents offered neither the youth nor the wartime experience Congress sought in postwar militiamen. Accordingly, Congress rationally chose not to furnish them with a retirement-pay incentive for reenlistment.

Indeed, Congress' determination not to afford appellees an incentive to remain in or rejoin the militia was especially appropriate in view of their failure to perform active duty during wartime. The purpose of the militia, as it is of the military in general, is "to fight or be ready to fight wars should the occasion arise." *United States ex rel. Toth* v. *Quarles,* 350 U.S. 11, 17. Notwithstanding their pre-1945 membership in the militia, individuals like Fioto had not fulfilled the purpose for which a militia or other military service is maintained. Congress therefore understandably saw no reason to encourage their continued or renewed participation in such service. Whether their failure to perform active duty during wartime had resulted from an unwillingness to serve, physical or mental disability, the critical nature of their civilian employment, or some other cause, it was reasonable for Congress to consider this past history in assessing the

likelihood that such individuals would perform active duty during future wars if induced to remain in the nonregular military service by the promise of retirement pay.[11]

Accordingly, while Congress did not exclude from eligibility for retired pay other older individuals who had not fought in World War II, that fact does not render the classification invalid as to former militiamen who already had once failed to assist the militia in carrying out its basic purpose. Congress could properly consider that history in distinguishing between such former militiamen and other potential recruits. Cf. *Marshall* v. *United States*, 414 U.S. 417. Moreover, in view of the 20 years' service requirement (10 U.S.C. 1331(a)(2)) and the provisions for a mandatory retirement age (*e.g.*, 32 U.S.C. 313; National Guard Reg. 600–200, ¶2–6(b)(4); see 10 U.S.C. 1331 (a)(1)), Congress could reasonably believe that there would be relatively few older individuals who had no pre-1945 nonregular military service (and who had not been affected by the general mobilization during

[11] Of course, some of the individuals excluded from eligibility for retirement pay by the Act in 1948 may have been willing and able to perform future active wartime duty. But Congress was not constitutionally required to conform the statutory exclusion more exactly to the physical and mental attributes of separate individuals; Congress was entitled to employ broad statutory classifications, and such classifications did not have to be made "with mathematical nicety." *Dandridge* v. *Williams*, 397 U.S. 471, 485. Moreover, Congress subsequently amended the Act to extend retirement pay to those otherwise excluded individuals who did in fact serve on active duty during the Korean War. See pp. 11–12, *supra*.

World War II) who could achieve eligibility for retired pay by first enlisting in the militia after 1945.

The district court nevertheless concluded that the statutory exclusion could not constitutionally be applied to those individuals who, like appellees, had served in the militia before 1945, had failed to perform active duty during wartime, but had served for a full 20 years after 1945. The court reasoned that there is now no rational basis for making distinctions as to eligibility for retirement pay among militiamen all of whom have completed 20 years' post-1945 service. It may well be that, viewing events retrospectively, appellees now are as "deserving," in a social welfare sense, as other men who served in the militia for 20 years after 1945 without performing active duty during the Korean War. But that fact, if established, would not detract from the rationality of Congress' decision in 1948 narrowly to tailor the incentive of retirement pay to exclude appellees from the right to earn such pay through future service.

The 1948 Act was principally a compensation statute that created an incentive by extending to certain individuals a promise of payment upon the completion of future service. As such, the Act must be found constitutional if the distinction drawn between those to whom the incentive was offered and those to whom it was not was reasonable at the time of enactment. The legislative judgment, made in 1948, that the recruitment needs of the post-war militia could be met by affirmatively encouraging the enlistment only of veterans, and of men who had not belonged to the militia without performing active wartime service, was

grounded in a practical assessment of the likely future availability of the various categories of potential militiamen for active wartime duty. Nonregular military service remained open to individuals like appellee Fioto, who could fairly be regarded as less likely to perform active wartime duty, but Congress reasonably determined that the interest of the nation in military preparedness did not require that such individuals be encouraged to reenlist through the incentive of retirement pay.[12]

In short, the exclusion of individuals like appellees from eligibility to earn retirement pay reflected considerations of military cost-effectiveness: Congress reasonably determined that the military expenditures that would be incurred by extending the opportunity for retirement pay to such individuals were simply not likely to provide the nation with enhanced preparedness for war. This was a legitimate and rational choice for Congress to have made, and it therefore should be sustained as constitutional.

B. A SUBSIDIARY PURPOSE OF THE ACT WAS TO REWARD MILITIAMEN WHO HAD SERVED ON ACTIVE DUTY DURING WARTIME, AND APPELLEES HAD NOT SO SERVED

Congress also adopted the 1948 Act in part to reward those militiamen who had served on active duty

[12] Indeed, the fact that some individuals, such as Fioto and the unnamed appellees, chose to reenlist and to serve for 20 years after 1945, even though they were excluded from eligibility for retirement pay, illustrates that the additional incentive of retirement pay was not necessary to induce them to do so. And certainly appellees cannot claim that the operation of the statute is unduly harsh as to them, for they may be presumed to have known as early as 1948 that they were ineligible for retirement pay; they need not have reenlisted thereafter.

during wartime. Such individuals were included in the retirement-pay program and were permitted to count their pre-1945 years of service in calculating the 20 years' service requirement for eligibility. 10 U.S.C. 1331(c), 1332(a)(1). But there was no basis for any similar show of gratitude to those individuals, such as appellee Fioto, who had been in the nonregular military service before or during World War II and yet had not faced the hardships and dangers of wartime active duty.

There were two related though distinct elements to the congressional view of retirement pay as a reward for past wartime service. To begin with, Congress was of the opinion that a retirement-pay reward should not be extended to individuals who, though available, had failed to come to the nation's defense in its time of need. See Senate Hearings on H.R. 2744, *supra,* at 77. Quite apart from a desire to withhold retirement pay from those who may have deliberately avoided active duty service, however, Congress also wished to demonstrate to the "thousands of men" who were in the Reserve and "who bore their full share of the conflict in two wars," "that this Nation at least is grateful * * *." Senate Hearings on H.R. 2744, *supra,* at 29; 94 Cong. Rec. 2490 (Congressman Miller).[13]

This latter view recognizes the distinction between those who faced the hardships and dangers of wartime

[13] The congressional purpose to reward active duty during wartime was reaffirmed by the 1958 amendment to the Act, which added service on active duty during the Korean War to the exceptions to the eligibility bar of 10 U.S.C. 1331(c). See pp. 11–12, *supra.*

active duty and those who, for whatever reason, did not. In the district court, appellee Fioto asserted that he had been "found medically unqualified when he attempted to enlist in World War II" (Br. 10, note), and therefore, implicitly, that his failure to serve had not been due to any unwillingness on his part. There is no evidence in the record to support this assertion (see note 3, *supra*). But, even if Fioto had been physically unable to serve during the war, that would not alter the fact that he did not confront the dangers and hardships of wartime active duty service or render the statute's application to him invalid. Congress reasonably decided that in extending retirement pay as a reward for past service, it would require that a part of the service be in wartime active duty. See, *e.g.,* Senate Hearings on H.R. 2744, *supra,* at 29.

In thus distinguishing, for purposes of eligibility for retirement pay on the basis of past service, between individuals who had served on active duty during wartime and those who had not, Congress was making virtually the same distinction that this Court sustained as rational in *Johnson* v. *Robison, supra.* In *Robison,* Congress had distinguished between military service and alternative civilian service for purposes of eligibility for educational benefits. In upholding this distinction, the Court noted (415 U.S. at 379):

> * * * [T]he disruptions suffered by military veterans and alternative service performers are qualitatively different. Military veterans suffer a far greater loss of personal freedom during their service careers. Uprooted from civilian life, the military veteran becomes part of the military establishment, subject to its discipline and potentially hazardous duty.

Precisely the same is true of the difference between a reservist or guardsmen who was activated into wartime duty and one who, like appellee Fioto and the other members of his class, was not.

* * * * *

For the foregoing reasons, we submit that the exclusion of appellees from eligibility to earn retirement pay was rational and should be sustained as constitutional. But if this Court disagrees, we further contend that the district court lacked power to enter a judgment against the Secretary of the Army for retirement pay retroactive to the date of retirement (see J.S. App. C, p. 12a; note 1, *supra*). The government did not advance this contention in the district court. However, this Court's intervening decision in *United States* v. *Testan,* 424 U.S. 392, has cast substantial doubt upon whether the Tucker Act confers jurisdiction to entertain that portion of appellees' suit that seeks retroactive retirement pay, *i.e.,* a money judgment against the federal government. Since the issue is jurisdictional, it may of course be raised at any time. But it would be appropriate to afford the district court an opportunity to consider it in the first instance. Accordingly, if this Court should determine, contrary to the position stated in this brief, that 10 U.S.C. 1331(c) is unconstitutional as applied to the appellee class, the Court should vacate the judgment of the district court insofar as it awards retroactive retirement pay and remand that portion of the case for reconsideration in light of *Testan.*

1. Although this suit is brought against the Secretary of the Army, the retroactive award of retirement pay is a money judgment that "would expend itself on the public treasury." *Land* v. *Dollar,* 330 U.S. 731, 738; see *Dugan* v. *Rank,* 372 U.S. 609, 620; *Hawaii* v. *Gordon,* 373 U.S. 57, 58. To that extent, appellees' claim is one for recovery of money from the sovereign. See *Edelman* v. *Jordan,* 415 U.S. 651; *Ford Motor Company* v. *Department of Treasury,* 323 U.S. 459. The United States is an indispensable party to such a case. See, *e.g., Mine Safety Appliances Co.* v. *Forrestal,* 326 U.S. 371, 374–375; *Minnesota* v. *United States,* 305 U.S. 382, 386–388.[14] Moreover, district courts have power to award monetary relief against the government only to the extent that jurisdiction is conferred over actions against the United States by the Tucker Act, 28 U.S.C. 1346(a), which provides in pertinent part that "district courts shall have original jurisdiction * * * of * * * [a]ny * * * civil action or claim against the United States, not exceeding $10,000

[14] In *Mine Safety Appliances Co.* v. *Forrestal, supra,* plaintiff-appellant sued the Under Secretary of the Navy for injunctive relief to require him to pay money allegedly owing under a contract (326 U.S. at 371–372). The Court stated, in terms that are equally applicable here (*id.* at 374–375):

"The assumption underlying this action is that if the relief prayed for is granted, the government will pay and thus relinquish ownership and possession of the money. In effect, therefore, this is an indirect effort to collect a debt allegedly owed by the government * * *. * * * [T]he sole purpose of the proceeding is to fix the government's and not the Secretary's liability. Thus, * * * the conclusion is inescapable that the suit is essentially one designed to reach money which the government owns. Under these circumstances the government is an indispensable party * * *."

in amount, founded either upon the Constitution, or any Act of Congress * * *."[15]

2. For these reasons, the district court did not have jurisdiction to award retirement pay retroactive to the date of retirement in this suit against the Secretary.[16] But even if the United States had been joined as a party defendant, the claim for an award of retire-

[15] The record shows that from January 1, 1968 (appellee Fioto was honorably discharged from the National Guard on December 9, 1967) until February 28, 1975 (this action was instituted in January 1975), appellee Fioto would have received retirement pay in the amount of $7,973.45 if he had been eligible for those benefits under 10 U.S.C. 1331 (App. 34).

[16] The mandamus statute, 28 U.S.C. 1361, on which the district court sustained jurisdiction here (J.S. App. A, pp. 3a–5a), merely grants jurisdiction over certain suits for prospective injunctive relief and is not a waiver of immunity for retroactive monetary relief. See *Essex* v. *Vinal,* 499 F. 2d 226, 231–232 (C.A. 8), certiorari denied, 419 U.S. 1107; *White* v. *Administrator of General Services Administration,* 343 F. 2d 444, 447 (C.A. 9). See also *United States* v. *Testan, supra,* 424 U.S. at 401 n. 5.

The other jurisdictional bases alleged in appellees' complaint (28 U.S.C. 1331(a); the Administrative Procedure Act, 5 U.S.C. 701 *et seq.*, 28 U.S.C. 1343(4); and the Fifth Amendment) do not waive sovereign immunity for purposes of recovery of money. 28 U.S.C. 1331, like the Tucker Act, is not a waiver of sovereign immunity; it merely defines the kinds of cases over which the district courts have jurisdiction. See, *e.g., Beale* v. *Blount,* 461 F. 2d 1133, 1138 (C.A. 5); *Cotter Corporation* v. *Seaborg,* 370 F. 2d 686, 692 (C.A. 10). Even if it were assumed that the Administrative Procedure Act confers jurisdiction—an issue now before the Court in *Mathews* v. *Sanders,* No. 75–1443—at most it would confer jurisdiction only over actions "seeking relief *other than* money damages" (5 U.S.C. 702, as amended by Pub. L. 94–574, October 21, 1976; emphasis added). No entitlement to monetary relief is created by the Due Process Clause of the Fifth Amendment, and 28 U.S.C. 1343(4) grants jurisdiction only over certain actions (of which the present suit is not one) involving statutes "for the protection of civil rights, including the right to vote."

ment pay retroactive to the date of retirement is one as to which sovereign immunity has not been waived. "The Tucker Act * * * merely confers jurisdiction * * * whenever the substantive right exists." *United States* v. *Testan, supra,* 424 U.S. at 398. The question whether there is such a "substantive right" "depends upon whether any federal statute 'can fairly be interpreted as mandating compensation by the Federal Government for the damages sustained'" (*id.* at 400).

No federal statute creates a substantive right in the appellee class to retroactive retirement pay. The only conceivable statute upon which appellees can rely is the statute at issue in this case, 10 U.S.C. 1331 (see Mot. to Affirm 9, n. 3). But the reason for appellees' lawsuit is that this statute in fact denies them retirement pay. The provisions of 10 U.S.C. 1331(a) and (e) establish an "entitlement" to retirement pay only for those individuals meeting the eligibility requirements of the statute, and appellees by definition are not in this class (see J.S. App. B, p. 9a). In short, insofar as the appellees sought retroactive pay, their suit was one to which the United States had not consented.[17] See *United States* v. *Sherwood,* 312 U.S. 584.

[17] Although sovereign immunity does not bar suit for prospective injunctive relief where a government officer is acting pursuant to an unconstitutional statute or beyond his statutory powers (see *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682; *Malone* v. *Bowdoin*, 369 U.S. 643), these exceptions do not pertain to a claim, such as the one here, that would require payment of money by the sovereign. Cf. *Larson* v. *Domestic & Foreign Commerce Corp., supra,* 337 U.S. at 691 n. 11.

Cf. *Edelman* v. *Jordan, supra.*[18]

[18] In *Edelman* v. *Jordan, supra,* the Court considered a class action against state officials to recover, *inter alia,* retroactive benefits that had been unlawfully withheld. The Court reversed the portion of the court of appeals' judgment that permitted recovery of retroactive benefits against the state. Rejecting the plaintiffs' argument that such payments amounted to "equitable restitution," the Court held that retroactive benefits are "in practical effect indistinguishable in many aspects from an award of damages against the State" (415 U.S. at 668), and, therefore, were barred by the sovereign immunity principle of the Eleventh Amendment.

The principles of sovereign immunity applied in *Edelman* under the Eleventh Amendment apply equally to suits against the United States. See *Larson* v. *Domestic & Foreign Commerce Corp., supra,* 337 U.S. at 687–705; *id.* at 708 (dissenting opinion of Mr. Justice Frankfurter). See also 3 Davis, *Administrative Law Treatise,* § 27.02, p. 548, n. 1 (1958 ed.):

"The Eleventh Amendment creates sovereign immunity of states in certain suits in the federal courts.

"No difference is discernible in modern law between suits against states in the federal courts, and suits against the United States in federal courts." * * *

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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FOR ARGUMENT

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1704

MARTIN R. HOFFMANN, Secretary of the Army,
Appellant,

v.

LOUIS J. FIOTO, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1704

MARTIN R. HOFFMANN, Secretary of the Army,
Appellant,

v.

LOUIS J. FIOTO, et al.,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLEES

OPINION BELOW

The opinion of the District Court (J.S. App. A, 1a-8a), as amended (J.S. App. B, 9a-10a), is reported at 409 F. Supp. 831.

JURISDICTION

By judgment entered Janaury 26, 1976, a unanimous three-judge District Court of the Eastern District of

New York granted summary judgment for plaintiffs in this action, holding unconstitutional 10 U.S.C. §1331(c) as applied to plaintiff and his class (J.S. App. C, 11a-12a). A notice of appeal to this Court was filed by the Government on February 25, 1976 (J.S. App. D, 13a-14a). On April 19, 1976, Mr. Justice Marshall extended the time for docketing the appeal to and including May 25, 1976. The Government's jurisdictional statement was filed on May 24, 1976, and probable jurisdiction was noted on October 4, 1976 (A. 42). The jurisdiction of this Court is conferred by 28 U.S.C. §§1252 and 1253.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

In addition to the constitutional and statutory provisions set forth in Appellant's Brief, the following statutory provision is involved on this appeal:

Section 302 of the Army and Air Force Vitalization and Retirement Equalization Act of 1948, 62 Stat. 1087, as amended, 10 U.S.C. §1331, provides in pertinent part:

> (e) Notwithstanding Section 8301 of Title 5, United States Code, the date of entitlement to retired pay under this Section shall be the date on which the requirements of subsection (a) have been completed. (added Aug. 13, 1968. Pub. L. 90-485, §2, 82 Stat. 754.)

QUESTIONS PRESENTED

1. Whether, in view of the relevant legislative history as to the purpose of the Army and Air Force Vitalization and Retirement Equalization Act of 1948

(hereinafter "Act"), the proviso at 10 U.S.C. §1331(c) was intended by Congress to constitute a bar to eligibility for retired pay under the Act for an individual who, after August 16, 1945, served the twenty years of satisfactory service required for eligibility under the Act and, in addition, was a member of the National Guard or of the Reserves prior to August 16, 1945 and did not perform active duty during World War I, World War II or the Korean conflict.

2. Whether the proviso at 10 U.S.C. §1331(c), if construed to constitute a bar to eligibility for any retired pay under the Act for such an individual, is on its face and as applied to the plaintiff and plaintiff class members utterly irrational and unconstitutional as violative of the Due Process Clause of the Fifth Amendment.

3. Whether, if the proviso is held not to bar retired pay under the Act for the plaintiff and plaintiff class members, retired pay must be paid to them pursuant to statute as of the date they met all eligibility requirements.

STATEMENT

The Army and Air Force Vitalization and Retirement Equalization Act of 1948, 62 Stat. 1087, as amended, 10 U.S.C. §1331 *et. seq.*, grants retired pay for reservists and national guardsmen who meet certain age and service requirements including the requirement that they have reached 60 years of age and have served satisfactorily 20 years of service as computed under the service and point system of 10 U.S.C. §1332.

The challenged proviso at 10 U.S.C. §1331(c) states that:

> No person who, before August 16, 1945, was a Reserve of an armed force, or a member of the Army without component or other category covered by section 1332(a)(1) of this title except a regular component, is eligible for retired pay under this chapter, unless he performed active duty after April 5, 1917, and before November 12, 1918, or after September 8, 1940, and before January 1, 1947, or unless he performed active duty (other than for training) after June 26, 1950, and before July 28, 1953.

Plaintiff-Appellee (hereinafter "plaintiff") Fioto is presently retired from service in the United States Army. Plaintiff served in the United States Coast Guard from 1927 to 1931 and served in the Army National Guard from 1933 to 1940 and again from 1947 to 1967 (A. 7, 12). He received an Honorable Discharge on December 9, 1967, having reached the mandatory retirement age of 60 (A. 11). Due to injuries resulting from an automobile accident in 1941, plaintiff did not serve during World War II, nor did he participate in the Korean conflict since his unit was never called to active duty (J.S. App. A at 2a).

It is undisputed that Mr. Fioto has satisfied each of the requirements for retired pay set forth in 10 U.S.C. §1331(a) since he was sixty years old at the time of retirement, had since 1945 completed twenty years of satisfactory service as defined in §1332, and was not entitled to retired pay from the armed forces under any other provision of law. Thus, on September 5, 1967, plaintiff filed an application for retired pay for non-regular service pursuant to 10 U.S.C. §1331(a), which was denied. On February 21, 1974, Mr. Fioto renewed his application which, by letter dated September 25, 1974, the Army Board of Correction of Military Records denied on the ground that he was barred from any entitlement by the terms of the proviso contained at 10 U.S.C. §1331(c) (A. 27).

Mr. Fioto thereupon commenced this action for declaratory and injunctive relief in the United States District Court for the Eastern District of New York, initially seeking class certification and the convening of a three-judge court. The single District Judge determined that a statutory three-judge court must be convened. Prior to the decision of the three-judge court, the District Judge entered an order certifying the class, defined as reservists who have twenty years of qualifying service after August 16, 1945, as computed under the standards in 10 U.S.C. §1332, and are without active wartime duty (A. 38).

The three-judge District Court, in a unanimous opinion by Circuit Judge J. Edward Lumbard, held that, as applied to plaintiff and the members of his class, 10 U.S.C. §1331(c) violates the minimum constitutional requirements imposed by the Due Process Clause of the Fifth Amendment, and granted plaintiff's motion for summary judgment (J.S., App. A at 5a).

The Court found that Congress had "adopted the reasonable requirement that an individual serve twenty 'satisfactory' years, as measured by an objective standard," which is the 50 point per year system set forth at 10 U.S.C. §1332. (*Id.* at 6a, fn. omitted). Because there was no way to measure whether service was "satisfactory" prior to this legislation, Congress sought to discount the years prior to World War II. "An understandable exception was provided for those who had seen active duty during one of the World Wars." (*Id.* at 7a). The District Court concluded that "[t]here is simply no evidence in the legislative history that Congress intended that any pre-1945 service would create a perpetual bar to future benefits." (*Id.* at 7a).

As the Court below recognized, it is undisputed that if plaintiff Fioto's service in the National Guard had been limited to the years 1947 to 1967, he would be entitled to retired pay without any requirement of

active duty. The Court found that Mr. Fioto's additional earlier service from 1933 to 1940 could not constitutionally bar him from entitlement to retired pay, and that Mr. Fioto and members of his class are entitled to receive retired pay based on their twenty satisfactory years of service after 1945.[1]

SUMMARY OF ARGUMENT

While a literal reading of the challenged proviso contained at 10 U.S.C. §1331(c) does appear to perpetually exclude Mr. Fioto and his class from entitlement to any retired pay, that reading of the proviso is manifestly in head-on collision with the clearly and pervasively expressed congressional purpose of the Act to grant retired pay to reservists like Mr. Fioto who have twenty years of satisfactory service after 1945 as measured by the objective standards set forth at 10 U.S.C. §1332. An examination of the relevant legislative history conclusively demonstrates that by the proviso Congress could not have meant to override the purpose of the Act to award retired pay to individuals with twenty years of satisfactory service, by raising an absolute and irrevocable bar to entitlement for benefits against persons like Mr. Fioto who had twenty years of post-1945 satisfactory service and further had additional years of pre-1945 service without active wartime duty. The conclusion is inescapable that in enacting the proviso Congress intended only to disqualify any reservist from receiving credit toward eligibility for retired pay for pre-1945 years of service

[1] The District Court at the Government's request has stayed the payment of retirement benefits to all class members. The Government did not seek a stay of the payment of retirement benefits to the named plaintiff Mr. Fioto.

unless he performed active wartime duty. As found by the District Court, any other construction of the proviso would be unconstitutional as totally at odds with the actual congressional purpose of the Act.

Further, if the restrictive interpretation of the provision which is urged upon this Court by the Government is adopted, then the proviso creates distinctions among similarly situated reservists which are so arbitrary as to violate equal protection and due process principles of the Fifth Amendment. Thus, on the one hand, individuals like Mr. Fioto who have twenty years of satisfactory service in the reserves after 1945 would be denied entitlement to any retired pay solely because they additionally had some earlier pre-1945 years of service but no active duty during wartime. On the other hand, other similarly situated individuals who equally have twenty years of satisfactory service in the reserves after 1945 and as well performed no active duty during time of war are deemed entitled to retired pay because they had no years of service in the reserves prior to 1945. Such discriminatory treatment of similarly situated persons would be utterly irrational when measured against legitimate congressional goals, and hence unconstitutional.

Once 10 U.S.C. §1331(c) is determined not to bar eligibility for retired pay, Mr. Fioto and his class are entitled by statute (10 U.S.C. §1331(e)) to retired pay as of the date eligibility requirements were met by each member of the class.

ARGUMENT

POINT I

THE CHALLENGED PROVISO DOES NOT BAR ENTITLEMENT TO RETIRED PAY UNDER THE ACT FOR PLAINTIFFS WHO HAVE TWENTY SATISFACTORY YEARS OF SERVICE AFTER 1945, SINCE CONGRESS PLAINLY DID NOT INTEND THAT RESULT.

The controlling consideration in resolving the issue before the Court on this appeal is whether Congress, in enacting the Act and the proviso in question, intended to bar entitlement to retired pay for an individual who indisputably has performed twenty satisfactory years of service after 1945, as measured by the objective standards of 10 U.S.C. §1332, but has further had *additional* years of non-wartime service prior to 1945. A careful review of the entire legislative history of the Act and of the proviso makes it abundantly clear that reliance on the apparently "plain meaning" of the proviso to bar all entitlement to benefits for the plaintiffs is not determinative of whether Congress intended that result. As plaintiffs will demonstrate it is manifest that in enacting the proviso Congress did *not* intend to override the fundamental purpose of the Act, as reflected in the legislative history, to award retired benefits to reservists with twenty years of satisfactory service. Rather, Congress by the proviso meant only to deny credit for pre-1945 years of service unless active wartime service was performed. Where, as here, a literal reading of a statutory provision produces an unreasonable result plainly at variance with congressional purpose as a whole, this Court should give effect to the congressional purpose rather than the literal

wording of a provision in determining the meaning of the law. *Accord, Train* v. *Colorado Public Interest Research Group* ___ U.S. ___, 48 L.Ed.2d 434 (1976); *Cass* v. *United States* 417 U.S. 72 (1974); *Perry* v. *Commerce Loan Co.*, 383 U.S. 392 (1966); *National Labor Relations Board* v. *Fruit and Vegetable Packers*, 377 U.S. 58 (1964); *Cox* v. *Roth*, 348 U.S. 207 (1955); *United States* v. *Rosenblum Truck Lines*, 315 U.S. 50 (1942); *United States* v. *American Trucking Association*, 310 U.S. 534 (1940).

After analyzing the legislative history, the District Court correctly concluded that the congressional purpose of the Act was to provide retired benefits to reservists who satisfactorily served twenty years, thus creating an incentive to continued, long-term service (J.S., App. A, at 6a).

Tracing the legislative history of the Act from its inception in the House, through the final Senate version in 1948 and subsequent amendments will cogently demonstrate that the application of the challenged proviso to Mr. Fioto is contrary to the congressional purpose of the entire Act.

The purpose of the original House bill was to induce reservists to remain in service for longer periods of time. The sponsor of the measure, Congressman Brooks, stated the problem as follows:

> . . . the government has spent much money in the selection and early training of our reserves who have dropped out before much usefulness can be obtained from the training which they have received. Before World War II it was found that 10 percent of the Army reserve officers left service each year; and at the end of a 10-year period we had almost entirely a new set-up.
>
> 94 Cong. Rec. 2485 (1948)

The House was concerned that the country was losing its trained reservists. They felt "that one trained Reserve was worth five untrained Reserves, and it was actually economy to our Nation to retain in the Reserves the same men, without a mass turnover every year." Brooks, *id.* at 2487. The House decided that men who had dropped out of the reserves were those they especially wished to retain.

> . . . [I]t is pertinent to point out that during the hearings on H.R. 2744 it was stressed by practically every witness who testified concerning the Reserve retirement provision of this bill that the most effective type of Reserve force is one which is manned by personnel who have had extensive training over a period of years—not 2 or 3 years, but 10, 15 or 20 years.
>
> Congressman Van Zandt, *id.* at 2491.

In order to rectify the situation, a retirement system was created to encourage continued service of reservists who had extensive training.

> One answer has been the suggestion of inactive duty training pay. Of course, this does help in the recruitment problems. It is not the answer to the problem of holding the interest and activity of the Reserve, both enlisted and officer, after he has entered the Reserve and become fairly well trained. We feel that a modest retirement system is the answer.
>
> Congressman Brooks *id.* at 2485.

As noted in the House Report, the purpose of this legislation was to keep men in the reserve for a continuous period of service.[2]

[2] The purpose of the Act was not to induce men to enlist in the reserves for the first time. Government's Brief, at 13. That purpose was served by separate legislation passed by the House on March 9, 1948 (S.1174, 80th Cong., 1st Sess., 94 Cong. Rec. 2416 (1948)) which provided for payment to reservists for inactive duty training. The Bill was enacted as Pub. L. No. 80-460, 62 Stat. 87 on March 25, 1948. *Id.* at 3575.

> The underlying purpose in writing this policy as to reserve components into law is that the retirement benefits will furnish an incentive that will hold men in the reserve Components for a longer period of time. . . .
>
> H.R. Report 816, 80th Cong. 1st Sess. (1947) at 11.

The legislation as it passed the House conferred a retirement benefit for Reserve service but did not contain either the point system to measure satisfactory service or the challenged proviso. The House version prescribed a complicated computation formula for calculating eligibility for retirement benefits and left determination of the precise standards to the individual branches of the Reserves. 94 Cong. Rec. 2496-2497 (1948).

When the Bill was sent to the Senate, the Senate Committee for Armed Services held hearings, and recommendations concurred in by the Armed Services and Committee staff were proposed. The Senate Committee was concerned with the fiscal implications of the bill and the need for uniform and improved training standards among the branches of the Reserves. To accomplish this result the Senate added a section with a uniform point system to measure a year of satisfactory service in preference to leaving that measurement to the various military branches.[3] The same section added the proviso challenged here.

The meaning of the proviso cannot be discerned without reference to the purpose and the legislative history of the Act. The Senate Report sets out the purpose of that Section:

[3] The objective standards for satisfactory service adopted by Congress are set forth in 10 U.S.C. §1332; the District Court sets them forth at fn. 6 (J.S., App. A at 6a).

> Title III, this title has been amended substantially in an effort to cut down the potential costs of the title and in order to insure an improvement in the training requirement of Reserves who wish to quality for benefits. The Bill as it passed the House had a maximum potential cost of $400,000,000 per year. As amended, the maximum potential cost is approximately $18,000,000 per year. The standard for retirement qualifications under this title have been so set that it definitely eliminates from the benefits of this title the Reserve who does not render diligent service for 20 years. . . .
>
> S. Rept. 1543 80th Cong., 2d Sess. (1948) at 2.

By its amendments, the Senate enumerated **criteria** for 20 years of satisfactory service, but clearly never intended to change the purpose of the House Bill which was to induce long term reserve service.

> The amendments that are suggested to the bill since it passed the House are all perfecting amendments; none of them change the intent or purpose of the bill as it passed the House.
>
> Statement of Col. Melvin J. Maas, Hearings on H.R. 2744 before the Senate Committee on Armed Services, 80th Cong., 2d Sess. (1948) at 23.

Cf. Cass v. *United States*, 417 U.S. 72, 81-82 (1974).

The Senate amendments were aimed at setting out a statutory definition of "satisfactory" service rather than leaving it to administrative regulations to be promulgated by the various branches of Service:

> The plan [the Senate amendments] differs markedly from the House in this degree, that each of them require 20 years of so-called satisfactory service. The House version left the term "satisfactory" to be defined by regulations. We have

> written into this law, and the Reserves have agreed to it, certain standards which are going to be extremely difficult to meet, and these are spelled out in the law.
>
> Statement of J.M. Chambers, member of the Committee Staff, Senate Hearings, *supra* at 66.

The Senate amendments created a system *in futuro* to measure reserve service in each year and to determine whether it was satisfactory. Under the standard thereby established, 50 qualifying points must be earned to gain a year of satisfactory service. Failing to earn 50 points in one or more years did not act as a permanent bar to benefits. All that was required of anyone to become entitled to benefits was 20 years of satisfactory service after 1945.

> Sen. Saltonstal. Just to supplement what you say, a man today has got to get 50 points a year for 20 years. If he misses out through sickness or anything else, in any 1 year, in attaining his 50 points he is out of luck on his retirement. Am I correct?
>
> Mr. Chambers. That is correct. He is out of luck insofar as that one year is concerned.
>
> Senator Hill. He could pick it up?
>
> Mr. Chambers. He could serve another year of satisfactory service. When he has acquired 20 years of satisfactory service he would be qualified.
>
> *Id.* at 67

Since there was no point system prior to the enactment of the legislation, there was no way to measure satisfactory past service. The challenged proviso addressed itself to this situation. The proviso gave reservists credit for their pre-1945 service if they had active wartime duty. It recognized and rewarded the service of certain reservists which was performed before

the legislation was enacted creating the point system. It created a system to credit otherwise unmeasurable years of service.[4] By the same token, the proviso contemplated that those individuals who served before 1945 but did not see active wartime duty would not receive any credit for that pre-1945 service. A colloquy between Major General John Dahlquist, the Army's Chief spokesman, and Senators Byrd and Maybank makes plain that the Senate's exclusive concern was with measuring credit for years of service.

> General Dahlquist. To qualify for the future, a year of satisfactory service, the man has to have 50 points. . . .
>
> Senator Byrd. How about the past, sir?
>
> General Dahlquist. The past, he gets credit for that as our records show that he was a satisfactory reserve officer; he gets credit for each year that he was a reserve officer.
>
> * * * *
>
> Senator Maybank. If they have not been in the war, you said they did not get *credit*.
>
> General Dahlquist. That is right. . . .
>
> (Emphasis added) *Id.* at 69

Senator Maybank's use of the word "credit" is crucial. He could not have made it any plainer that by the proviso, pre-1945 non-wartime service simply could

[4] Of course, the twenty satisfactory years of service of Mr. Fioto and his class *after* 1945 are sufficient to entitle them to retired pay, and those persons are not in need of any credits for their *additional* service in the reserves prior to 1945.

not be "credited" under the point system.[5] The concept of credit is fundamentally at odds with the notion of a perpetual bar.[6]

Finally, Senator Maybank made it unmistakably clear that no reservist who satisfied the standards for twenty

[5] The statement of General Dahlquist which is cited in Appellant's brief at p. 11 is not inconsistent when taken in the context of his entire answer. In essence he is explaining why pre-1945 years are counted as *satisfactory* only if there is wartime active service. He does not indicate that those years should act as a perpetual bar to someone with 20 years of satisfactory service after 1945.

> General Dahlquist. Our first objective is an incentive for the future.
>
> However, we face this practical situation that we have thousands of men who were responsible for the fact that we were in a position to have a Reserve unit without which we could not have mobilized so that part of the incentive to the future is to show that this Nation at least is grateful to all those men who did something in the past.
>
> The purpose of reservists was to fight in the war. If he did not fight in the wars we did have, we feel he should not qualify.
>
> Senate Hearing, *supra* at 29

Equally, the concept of "qualification" mentioned by Senator Gurney and cited in Appellant's brief at p. 11 refers to the barrier created by the proviso against the earning of credits for pre-1945 years of service where the individual had no active wartime duty.

[6] As is pointed out in the *amicus curiae* brief of the U.S. Merchant Marine Academy Alumni Association, the wording of the proviso as adopted in 1948 is not inconsistent with the "credit" concept. The original statute's proviso precluded "retirement benefits." (Pub. L. No. 80-810 §302(a), 62 Stat. 1087 (1948)) In other sections of the statute the "right to accrue retirement benefits under this title" refers to the right to get *credit* for years served (*Id.* at §304). When statutes relating to Armed Forces were codified in 1956 (70 A. Stat. 102) the words "retirement benefits" in the proviso were changed to "retired pay" (10 U.S.C. §1331(c)). However, the legislative purpose of the codification was to reinstate the law without substantative change. 70 A. Stat. 640.

years of satisfactory service set forth in 10 U.S.C. §1332 was to be singled out for denial of benefits.[7]

> Senator Maybank. I want the information for the record. There is no discrimination whatsoever in this bill against any enlisted man, if he not be promoted or anything else, so long as he carries out his 20 years and earns his 50 points.
>
> *Id.* at 67.

To have intended the proviso to raise an absolute and irrevocable bar against entitlement for retired pay against some individual who had performed twenty satisfactory years of service would have fundamentally altered the basic congressional purpose of the Act to award such benefits to persons with twenty satisfactory years of service. Far from containing the clear indication of legislative intent that would be expected if Congress had meant by the proviso to alter the basic purpose of the Act, the legislative history reflects, on balance, a congressional intention to award benefits to reservists who, like Mr. Fioto, had twenty years of satisfactory service and an intent by the proviso only to deny to a man with pre-1945 reserve service, but no active war-time duty, eligibility for credit toward retired pay for those pre-1945 years.[8] Thus, in construing

[7] By the 1958 amendment to the Act (H.R. 781, 85th Cong. 1st Sess.), Congress extended credit for their non-active pre-1945 service to reservists who performed active duty in the Korean conflict (June 27, 1950 - July 27, 1953), and thus enabled such of those reservists who otherwise would not have had twenty years of satisfactory service to obtain sufficient credits to secure entitlement for retired pay. Of course, no similar ameliorative amendment was necessary for men like Mr. Fioto who in any event had twenty satisfactory years of post-1945 service.

[8] As the District Court held, "[w]e need not and should not defer to the Army's construction of §1331(c) when that construction is at odds with Congress' clear purposes and goals in enacting the statutory scheme of which §1331(c) is just a part." (J.S.. App. A, 7a-8a)

congressional intent here, this Court should give effect to the plain purpose of the Act to award benefits to a man like Mr. Fioto with twenty satisfactory years of service after 1945 rather than bowing, as the Government urges, to any contrary literal reading of the proviso which is so fundamentally inconsistent with congressional purpose. *Train* v. *Colorado Public Interest Research Group, supra; Cass* v. *United States, supra; United States* v. *American Trucking Association, supra.*

In the face of the plain congressional purpose of the Act, as reflected in the legislative history, to give retired pay to all reservists with twenty satisfactory years of service, any construction of the proviso which would bar retired pay to Mr. Fioto and members of his class would be so totally at odds with the actual congressional purpose as to violate basic due process principles of the Fifth Amendment's Due Process Clause.

POINT II

IF CONSTRUED TO BAR IRREVOCABLY ENTITLEMENT OF PLAINTIFFS TO RETIRED PAY UNDER THE ACT, THE PROVISO, ON ITS FACE AND AS APPLIED, CREATES IRRATIONAL CLASSIFICATIONS IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FIFTH AMENDMENT.

It is undisputed that if Mr. Fioto's service in the National Guard had been limited to the years 1947 to 1967, he would be entitled to retired pay. However, the Government contends that Mr. Fioto's additional years of earlier service from 1933 to 1940 bar him from all benefits.

As plaintiffs have amply demonstrated in Point I, *supra*, the challenged proviso at 10 USC §1331(c) must be construed so as not to frustrate the manifest congressional purpose of the Act to award retired pay to reservists like Mr. Fioto who have twenty satisfactory years of service after 1945. If, as the Government urges here, the proviso is construed to constitute a perpetual bar to entitlement for any retired pay for a reservist like Mr. Fioto who has twenty satisfactory years of post-1945 service, merely because he had *additional* pre-1945 years of service without wartime active duty, the proviso must be found unconstitutional.

If construed restrictively as a perpetual bar preventing Mr. Fioto from receiving retired pay, the proviso creates utterly irrational classifications between similarly situated persons. On the one hand, a person the same age as Mr. Fioto who has performed twenty satisfactory years of service after 1945 with no wartime active duty, but who had no reserve service before August 16, 1945, is entitled to receive retired pay. On the other hand, Mr. Fioto, who like his counterpart performed twenty satisfactory years of service after 1945 with no wartime active duty, but who was "unfortunate" enough to have rendered *additional* years of service in the reserve before August 16, 1945, would automatically, irrevocably, and pertpetually be barred from every becoming entitled to retired pay. The two persons are identically situated in every relevant respect. Both men are the same age. Thus the congressional purpose asserted by the Government to induce younger men to enlist or re-enlist in the National Guard or Reserve (Government's Br. at 13-18) cannot support the distinction.[9] Neither man had any active duty in World

[9]The objective of inducing young men to enlist in the Reserve is separately secured by the statutory requirement that the twenty years of service which entitle a reservist to retired pay must be accumulated prior to the mandatory retirement age of sixty years. See Government's Brief at 16.

War I or World War II.[10] Hence, the congressional purpose asserted by the Government to encourage men with wartime experience to enlist or re-enlist in the Guard or Reserve (Government's Br. at 14) cannot support the distinction. Finally, neither man performed *any* active wartime duty, either in World War I or II or in the Korean conflict.[11] Thus, the congressional purpose asserted by the Government to reward those reservists and guardsmen who had served on active wartime duty (Government's Br. at p. 18-21) cannot support the distinction.[12] The only difference in the

[10]Among the findings of fact made by the District Court was that Mr. Fioto did not serve in World War II because of injuries resulting from an automobile accident, and that he did not participate in the Korean War since his unit was never called to active duty (J.S., App. A, at 2a). On this appeal, the Government for the first time seeks to put into issue the reason for Mr. Fioto's non-participation in World War II, by lodging with The Clerk of this Court a portion of Mr. Fioto's Army personnel record. Clearly this is improper under the well-settled principle that this Court will not accept evidence offered for the first time on appeal. *Morrisey* v. *Brewer*, 408 U.S. 471 (1972); *Henneford* v. *Northern Pac. Ry. Co.*, 303 U.S. 17 (1937). In light of the circumstances, it is not inappropriate to observe further that if the Government had seen fit to put into issue in the District Court the reason for Mr. Fioto's non-service during World War II, Mr. Fioto would have testified that because of the injuries sustained in his automobile accident he was unsuccessful in his efforts to enlist during World War II.

[11]The 1958 amendment to the proviso (H.R. 781, 85th Cong. 1st Sess.) did nothing to cure or dilute the irrationality of the classifications created by the original proviso, since it only granted credit for pre-1945 non-wartime years of service for reservists who later performed active duty in the Korean conflict.

[12]Further, the objectives of the Act and of the proviso which are asserted by the Government do not constitute the actual congressional purpose of the Act to create an incentive to continued, long term reserve service for trained reservists and of the proviso to credit the pre-1945 years service of reservists who had seen active wartime duty and not to credit those years for those who had no wartime duty. See POINT I, *supra*.

circumstances of the two men is that Mr. Fioto has *additional* years of service in the reserves before 1945. That distinction not only cannot rationally support a law which would deny benefits to Mr. Fioto while giving them to his counterpart, but, indeed, if anything, argues for more favorable treatment for Mr. Fioto. However, by this suit, Mr. Fioto seeks not *preferential* but rather only *equal* treatment as compared to those persons similarly situated to him.[13] He seeks only to avoid, as the District Court observed, "being penalized for having devoted seven additional years to the service of his country." (J.S., App. A, at 5a).

The classifications created by the proviso, if given the Army's construction, between Mr. Fioto and other similarly situated reservists are thus utterly without rational basis.

If the proviso is construed to bar entitlement to retired pay for reservists with pre-1945 service who had performed no active wartime duty, the only reasonable conclusion that can be drawn is that, as stated by Circuit Judge Lumbard in the court below, "Congress simply never anticipated a situation such as Fioto's," (J.S., App. A at 7a)[14] whereby he had twenty satisfactory years of service after 1945 in addition to pre-1945 years of non-wartime service. The only constitutional conclusion that can be drawn is that the proviso, if interpreted as a bar to retired pay for the

[13]As observed earlier, p. 14, fn. 4, Mr. Fioto does not seek, and does not require, credit for his years of service in the reserve *before* 1945 in order to achieve the twenty satisfactory years of service which Congress intended to entitle him to retired pay.

[14]Anomalously, up to the time of this appeal, the Government had given the same reading as the plaintiffs' to this aspect of the legislative history, and had admitted Mr. Fioto's situation to have been a legislative oversight. (J.S. App. A at 7a).

plaintiffs, creates classifications which are not rationally related to legitimate congressional goals and hence violate the equal protection and due process principles of the Fifth Amendment's Due Process Clause. *See generally*, *Richardson* v. *Belcher*, 404 U.S. 78, 84 (1971).

POINT III

ONCE 10 U.S.C. §1331(c) IS DETERMINED NOT TO BAR ELIGIBILITY FOR RETIRED PAY, MR. FIOTO AND HIS CLASS ARE ENTITLED PURSUANT TO FEDERAL STATUTE TO RETIRED PAY AS OF THE DATE STATUTORY REQUIREMENTS WERE MET BY EACH MEMBER OF THE CLASS.

The Government now suggests that if 10 U.S.C. §1331(c) does not constitute a bar to entitlement to retired pay, the District Court nonetheless lacked the power to enter a judgment against the defendant Secretary of the Army for retroactive retired pay for the plaintiff and plaintiff class members as of the date each satisfied the statutory requirements under the Act. Specifically, the Government characterizes that part of this suit which seeks payment of retroactive retired pay to plaintiff and plaintiff class members as a claim for money damages against the United States pursuant to the Tucker Act, 28 U.S.C. §1346, and argues that the United States is thus an "indispensable party" here and, in any event, enjoys sovereign immunity from such a monetary claim.

The Government's position is without merit. The short answer to its contention is that, as found by the District Court (J.S., App. A, at 3a-5a), the plaintiffs by

this action do not seek a money judgment pursuant to the Tucker Act, but rather seek mandamus relief pursuant to 28 U.S.C. §1361 to compel the Secretary to perform his statutory (Point I) or, alternatively, constitutional (Point II) duty to pay the plaintiff and plaintiff class members the retired pay to which they are entitled under the Act. Sovereign immunity constitutes no bar to such a suit against a governmental official since the plaintiffs contend that in denying them retired pay the Secretary is acting beyond his statutory powers or, alternatively, pursuant to an unconstitutional statute. *Dugan* v. *Rank*, 372 U.S. 609, 621 (1963); *Malone* v. *Bowdoin*, 369 U.S. 643 (1962).[15] Accordingly the particular governmental official–here the Secretary of the Army–who aggrieved the plaintiff is a proper party defendant in such a suit.

Finally, upon analysis, it is clear that sovereign immunity is not available to the Secretary as a defense to the District Court's award of retired pay to the plaintiff and plaintiff class members. In *United States* v. *Testan*, 424 U.S. 392 (1976), this Court held that in a suit seeking in part money payments from the federal government, a waiver of the traditional sovereign immunity of the United States is effectuated by the

[15]The Government claims that allowing public officials to be sued when they act outside their statutory authority or unconstitutionally does not pertain to a claim where payment of money by the sovereign is required. (Appellant's Brief at 24 fn. 17 citing *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, (1948)). However, in *Larson*, this Court only states that a suit may fail if the relief requested cannot be granted by ordering the cessation of the official's conduct, but requires an affirmative action by the sovereign or disposition of its property. *Id.* at 691, fn. 11. Here Plaintiffs seek that the Secretary of the Army cease applying the unconstitutional bar and therefore benefits flow from the date of statutory entitlement (10 USC §1331(e)).

existence of an express federal statutory provision making the government liable for the particular pay sought. In the instant case, the government's sovereign immunity from suit for the retired pay due the plaintiff and his class, once 10 U.S.C. §1331(c) is construed or constitutionally adjudicated not to constitute a bar thereto, is thus waived by 10 U.S.C. §1331(a) and (e)[16] which expressly entitle a person to properly computed retired pay as of the date he has satisfied the requirements of sub-section (a).[17]

[16]10 U.S.C. §1331(e), is set forth at p. 2 of this Brief.

[17]The District Court predicated its jurisdiction on 28 U.S.C. §1361. The plaintiffs additionally alleged that the District Court had jurisdiction over this action pursuant to, *inter alia*, the Administrative Procedure Act, 5 U.S.C. §701 *et seq.* As an alternative basis for concluding that sovereign immunity constitutes no bar to this suit, this Court should find that the Administrative Procedure Act confers subject-matter jurisdiction over this suit, *Coulter* v. *Weinberger*, 527 F.2d 224 (3d Cir., 1976); *Pickus* v. *U.S. Bd. of Parole*, 507 F.2d 1107 (D.C. Cir., 1974); *Ratnayake* v. *Mack*, 499 F.2d 1207 (8 Cir., 1974); *Sec'y. of Labor* v. *Farino*, 490 F.2d 885 (7 Cir., 1973), and constitutes a general waiver of sovereign immunity in actions seeking judicial review of federal administrative action. *Kingsbrook Jewish Medical Center* v. *Richardson*, 486 F.2d 663 (2 Cir., 1973); *Scanweld Laboratories* v. *Shaffer*, 424 F.2d 859 (D.C. Cir., 1970); *Estrada* v. *Ahrens*, 296 F.2d 690 (5 Cir., 1961).

Significantly, by Public Law 94-574, 90 Stat. 2721, enacted October 21, 1976, Congress amended 5 USC §§702 and 703 to make it explicit that an action seeking relief in the nature, *inter alia*, of mandamus against an officer or agency of the United States "shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party," and to permit the action to be brought against the United States, the agency, or the officer.

CONCLUSION

The unanimous judgment of the three-judge District Court should be affirmed.

Respectfully submitted,

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No. 75-1704

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

MARTIN R. HOFFMANN, Secretary of the Army,
Appellant

v.

LOUIS J. FIOTO, ET AL, *Appellees*

On Appeal from the United States District Court for the Eastern District of New York

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AMICUS CURIAE BRIEF OF THE UNITED STATES MERCHANT MARINE ACADEMY ALUMNI ASSOCIATION

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AMICUS CURIAE BRIEF OF THE UNITED STATES MERCHANT MARINE ACADEMY ALUMNI ASSOCIATION

(Filed With Written Consent of All Parties in the Case)

I

QUESTION PRESENTED

Whether Section 1331(c), Title 10, U.S. Code, as administered by appellant, is unconstitutional as violating the minimum requirements imposed by the

Equal Protection clause of the Fourteenth Amendment and, accordingly, also violates the Fifth Amendment?

II

INTEREST OF AMICUS CURIAE

Insofar as known, all alumni of the United States Merchant Marine Academy, Kings Point, New York, who served in the Nation's Merchant Marine during World War II were members of the United States Naval Reserve in one or more capacities, cadets, midshipmen, and officers. Many did not perform active duty in the Navy during the periods specified in 10 USC 1331(c)[1] which separately embrace World Wars I and II and the Korean War. Of these, a significant number, who have continued their active status in the Naval Reserve, will, except for the perpetual bar of § 1331(c), meet the qualifications for reserve retired pay upon reaching age sixty.

This alumni association has long recognized a need for corrective action in view of the potential of an unfair adverse application of § 1331(c) towards these wartime graduates of Kings Point. Although they are "in the same boat" as Fioto for the purposes of § 1331(c), the circumstances surrounding *why* they are *there* are quite different. In this connection, all our alumni were *required* to be in the Naval Reserve. Moreover, the casualty rate of merchant mariners ex-

[1] Hereinafter usually referred to as simply "§ 1331(c)." In its current form § 1331(c) provides that no person who was a "Reserve" of an armed force before August 16, 1945, is eligible for retired pay unless he performed active duty between April 5, 1917 and November 12, 1918, or September 8, 1940 and January 1, 1947, or June 26, 1950 and July 28, 1953.

ceeded that of any of the Armed Forces during World War II; they manned guns and fought the enemy on the front lines of the war at sea; and many were turned down in their attempts to be placed on active duty in the Navy during the war. Nothing has been found in the legislative history of the original act which manifests any Congressional intent or even an awareness of its adverse effect on our alumni.

Because of the impact which this Court's decision may have on our wartime alumni, we feel it important that the United States Merchant Marine Academy Alumni Association express its views in the instant case.

III

SUMMARY OF THE ARGUMENT

After careful review of the legislative history of Title III, Army and Air Force Vitalization and Retirement Equalization Act of 1948, Public Law 810,[2] 80th Congress, 62 Stat. 1081, and the last proviso of Section 302(a) in particular, we have concluded that the construction of this proviso by the three-judge district court, *Fioto* v. *Hoffman*, 409 F. Supp. 831, (D.C. N.Y. 1976), is a correct and wise one which is compatible with the intent of Congress as expressed in legislative history and which also constitutes a reasonable interpretation of the language of the original act. It is appellant's application of the act, not the act as such, which the lower court found unconstitutional.

Although, with the 1956 codification, the revised language, as such, became less amenable to interpreta-

[2] Hereinafter referred to as simply "PL810."

tion, the express legislative intent of the codification was to restate the law without change; thus § 1331(c) in its 1956 revised form should be construed to continue the original intent of the law. This construction, however, was not appreciated by the 85th Congress which amended § 1331(c) to its present form; nevertheless the purpose of its amendment, to place Korean War veterans in the same status as World War I and II veterans, was remedial and subject to liberal vice restrictive construction.

To construe the last proviso of Section 302(a) and the substituted § 1331(c) as providing a perpetual bar against qualification for reserve retirement pay by Reservists who did not serve on active duty during World War I or II (or later the Korean War) is unduly harsh and restrictive—especially insofar as our wartime alumni are concerned who were administratively and by the Merchant Marine Act, 1936, *required* to be members of the United States Naval Reserve. Our wartime alumni in answering the call of their country served in war zones, fought and many died to bring about total defeat of the enemy. We cannot, therefore, imagine any rationale for a law which would perpetually bar them from reserve retired pay while at the same time allowing a much greater number of civilians who were draft-deferred during World War II to qualify. If this was the intent of Congress, we think the result is an unconstitutional classification.

IV

DISCUSSION AND ARGUMENT

a. Facts.

(1) FIOTO SITUATION. The particular facts in *Fioto* are well laid out in the decision of the lower Court and

briefs heretofore submitted to this Court. Briefly, Appellee Fioto, served in the Army National Guard for a total of twenty-seven years, 1933 to 1940 and 1947 to 1967. Due to injuries resulting from an automobile accident in 1941, he did not serve during World War II; nor did he participate in the Korean War inasmuch as his unit was not called to active duty.

In anticipation of retirement, Fioto filed an application with the Department of the Army showing he satisfied each statutory requirement for retirement: (1) He was sixty years of age; (2) He had completed at least twenty years of satisfactory service as defined in the reserve retirement statute; and (3) He was not entitled to retirement pay from the Armed Forces under any other provision of law. The Army, however, denied his application on grounds that he was barred by § 1331(c).

(2) OUR SITUATION. With reference to the Merchant Marine during World War II, most Naval Reservists serving therein were appointed by authority of the Naval Reserve Act of 1938, (52 Stat. 1175). Under this act, the Naval Reserve was established as a component part of the United States Navy. The Reserve categories were the Fleet Reserve, the Organized Reserve, the Merchant Marine Reserve and the Volunteer Reserve. Under the specific heading "Merchant Marine Reserve," the act of 1938 provided in Section 318, 52 Stat. 1185, that the Merchant Marine Reserve was to be composed of those members of the Naval Reserve who follow, or have within three years followed, the sea as a profession or who are employed in connection with a seafaring profession, or men who are desirable for training for service on board public

vessels of the United States or other seagoing vessels documented under the laws of the United States as may be approved by the Secretary of the Navy. Under Section 319, 52 Stat. 1185, the Secretary of the Navy was authorized to prescribe a suitable flag or pennant to be flown as an emblem of the Merchant Marine Reserve on seagoing Merchant vessels documented under the laws of the United States under regulations as he prescribed, provided that the vessel was designated as suitable for service as a naval auxiliary in time of war and that the master or commanding officer and not less than fifty percent of the other licensed officers were members of the Navy or Naval Reserve. This provision was carried over in the Armed Forces Reserve Act of 1952, 66 Stat. 499, and is now codified as 10 USC 7225, 70A Stat. 447. However, the words "or Naval Reserve" were omitted as surplusage, since the Navy includes the Naval Reserve. *Explanatory Notes*, 10 USCA 7225.

Following enactment of the Naval Reserve Act of 1938, appointments were initially made as cadet, Merchant Marine Reserve, to students of the State maritime academies and the cadets of the United States Merchant Marine Cadet Corps. These young men were given six months subsequent to graduation in which to obtain appropriate licenses of the United States Merchant Service in order to qualify as commissioned officers in the Merchant Marine Reserve of the United States Naval Reserve; otherwise they were discharged.

It was (and still is) important for licensed officers in the American Merchant Marine be members of the United States Naval Reserve in view of specific requirements of an earlier act, the Merchant Marine

Act, 1936 (49 Stat. 1985). This act *required* that eligible Merchant Marine officers be members of the Naval Reserve.[3]

Membership in the Naval Reserve was (and is) thus made compulsory for deck and engineering officers eligible for such membership in two circumstances: (1) When employed in vessels on which an operating differential subsidy was paid under the act; and (2) When employed on vessels operated by the Maritime Commission (subsequently changed to the Department of Commerce) 49 Stat. 1993, 46 USC 1132(g).

In June of 1941, the Secretary of the Navy established a classification of midshipmen, Merchant Marine Reserve, in accordance with the Naval Reserve Act of 1938, and, the Secretary further authorized the Chief of the Bureau of Naval Personnel to appoint as midshipmen, Merchant Marine Reserve, all cadets, Merchant Marine Reserve, who were serving with vessels taken over by the Navy and who volunteered for active duty. In August of 1942, *all* cadets,

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[3] It is also required that the Navy participate in the design and planning of Merchant vessels for possible conversion to naval auxiliaries. The "Declaration of Policy" of such Act provided that "it is necessary for the National Defense . . . that the United States shall have a Merchant Marine . . . capable of serving as a Naval and Military auxiliary in time of war and National emergency . . . and . . . manned with a trained and efficient citizen personnel."

Subsidy contracts were required to include the provision that licensed officers "who are members of the United States Naval Reserve shall wear on their uniforms such special distinguishing insignia as may be approved by the Secretary of the Navy." Such insignia is presently authorized under par. 0155-1a, United States Navy Uniform Regulations, 1969, to be worn by "members of the Naval Reserve serving on Merchant Ships."

Merchant Marine Reserve, were appointed midshipmen, Merchant Marine Reserve.[4]

The 30 June 1941 *Register of Commissioned Officers, Cadets, Midshipmen and Warrent Officers of the United States Naval Reserve,* listed the members of the Merchant Marine Reserve on pages 385 to 472. Included were one captain, five commanders, 760 lieutenant commanders, 1,074 lieutenants, 972 lieutenants (junior grade), 1,784 ensigns and some 879 cadets.

The Navy had plans to activate the Merchant Marine Reserve shortly after the entry of the United States into the war. However, President Franklin Delano Roosevelt personally decided against this action. Nevertheless, although not *formally* militarized, the Merchant Marine soon had many of the characteristics of an armed service. The most important was that its members fought and died on the front lines of the sea—particularly in the battle of the Atlantic.[5]

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[4] U.S. Merchant Marine Academy cadet-midshipmen, were the only students from any of the then four (now five) federal academies who regularly served, as such, under combat conditions—participating in military operations in actual war zones. Two hundred, twelve names are listed on the War Memorial at Kings Point as having lost their lives in action during World War II.

[5] To illustrate, Convoy PQ-17 (sometimes known as the "Fourth of July" Convoy), seven days out Reykjavic, Iceland, on July 4, 1942, included thirty-three Merchant ships (of which twenty were American freighters) which, while sailing into enemy infested waters, were ordered to scatter and proceed independently to Archangel, USSR. To the chagrin of many of the Naval officers and men involved, two battleships (HMS Duke of York, USS Washington), four cruisers (HMS London, HMS Norfolk, USS Wichita, USS Tuscadoosa) and six destroyers escorting the Convoy PQ-17 were ordered to proceed West at high speed leaving the Convoy PQ-17 unprotected. Fighting their way through hostile

Maritime Service uniforms were provided (Merchant Marine ships' officers and seamen trainees) which were similar to Navy uniforms, but with distinctive insignia. Appointments to various Navy type grades were made in the United States Maritime Service by the Commandant of same under Regulations promulgated by the Administrator, War Shipping Administration. (E.O. 9054, 7 F.R. 837; E.O. 9188, 7 F.R. 5383)

Although the U.S. Navy supplied armed guard crews for American Merchant ships, these naval personnel were supplemented by the ship's crews. Many gun positions were manned completely by Merchant seamen. Combat bars and certain medals were authorized which were different from those of the Armed Services. 57 Stat. 81. Absentee voting for the Armed Forces and Merchant Marine was covered by the same statute. 58 Stat. 136. Under international treaty Merchant Marine officers and seamen were entitled to POW status, 36 Stat. 2387, 2388. They were subject to Court Martial.[6] For the criminal purposes of 18 USC 2387 (See 54 Stat. 670), the master, crews and officers of Merchant vessels in the service of the Army or Navy were included in the "military and naval forces of the United States."

An outstanding example of heroism of the Navy and Merchant marine personnel fighting together to

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submarines and aircraft, only eleven of the merchant vessels arrived in Russia with but 70,000 tons out of 190,000 tons of valuable war cargoes with which they had departed Reykjavic. *The Seafarers in World War II*, J. Bunker 1951; *Sea War*, F. Riesenberg 1956.

[6] See *Forgione* v. *U.S.*, 100 F. Supp. 239 (D.C.Pa. 1951), *affirmed* 202 F.2d 249, *cert. den.* 345 U.S. 966.

sink a German raider and to damage another was the battle of the S.S. STEPHEN HOPKINS, a liberty ship, which occurred on September 27, 1942, with the German auxiliary cruiser, the STIER and the German supply freighter TANNENFELS. The Navy Armed Guard crew manned the single 4-inch gun of the HOPKINS against six 5.9-inch guns of the STIER, the Armed Guard crew being killed or wounded until the Armed Guard officer, Ensign Kenneth M. Willett, USNR, manned the gun alone. After Ensign Willett was badly wounded by a magazine explosion under the gun turret, Engineering Cadet Midshipman, Edwin J. O'Hara, who had just escaped from the blazing engine room, took over the gun. With the magazine below in flames, O'Hara manned the gun alone and loaded and fired the last five rounds in the ready magazine scoring hits on the TANNENFELS and the STIER which sank. R. Vargus, *The Gallantry of "The Ugly Duckling"* American Heritage, December 1969.

The President, in an address to Congress on January 7, 1943 included a number of tributes to American merchant seamen in the contest of their military role:

> "The heroes, living and dead . . . . of the North Atlantic Convoys."
>
> "Of continued importance in the year of 1942 were the unending, bitterly contested battles of the Convoy routes . . ."
>
> "Any review of the year 1942 must emphasize the magnitude and diversity of the military activities in which this Nation has become engaged. As I speak to you approximately one and one-half million of our soldiers, sailors, marines and flyers are in service outside our continental limits, all through the world. Our merchant seamen are

> carrying supplies to them and to our allies over every sealane."[7]

President Truman in an address at a Navy Day celebration in New York, Oct. 27, 1945, stated:

> "On opposite sides of the world, across two oceans, our Navy opened a highway for the armies and air forces of the United States . . . . Together with their brothers in arms in the Army and Air Forces, and with the men of the Merchant Marine, they have helped to win for mankind all over the world a new opportunity to live in peace and dignity—and we hope, in security." *Public Papers of President Harry S. Truman,* 1945, item 178.

The price of the World War II Sealift was high. Over 600 U.S. flag ships were lost. Some 5,662 American merchant seamen lost their lives at sea or died in prisoner-of-war camps; there were 572 released prisoners of war; and another 500 men died while serving on foreign flag vessels under U.S. control. The losses of the American Merchant Marine lives proportionately exceeded those of the U.S. Navy by a substantial extent.[8]

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[7] H.D. par. 1, 78th Cong. 1st Session.

[8] The *World Almanac*, 1964 p. 739; see also: *Merchant Marine Naval Reserve Bulletin* No. 1, May 1946, p. 4. Employment on U.S. Flag vessels in 1940 was 49,800; in 1945 it was 158,900, 93rd Congress, 1st Session, House Document 93-78 (Part 2), U.S. Bureau of Census *Historical Statistics of the United States, Colonial Times to 1970*, p. 748. Vice Admiral Land stated on October 17, 1945 that 215,000 then manned the fleet, 7,500 lost their lives and 30,000 were torpedoed. *Report of War Shipping Administrator.* Hearings before the Committee on the Merchant Marine and Fisheries, House of Representatives, 79th Congress, on HR 2346, p. 80.

In the early stages of World War II, merchant vessels were requisitioned for the Navy to serve as naval auxiliaries and the officer and crew members aboard who were members of the Naval Reserve were placed on active duty to serve with the ship. These men included cadets who were ordered to active duty as midshipmen, U.S.N.R., and remained assigned to the ships until their sea tour was completed. However, as officer candidate courses of the Navy began to bear fruit and while there was a continued scarcity of qualified mariners, many requests for active duty by merchant marine officers were turned down. These officers were considered more valuable where they were.[9]

After termination of hostilities, a "Certificate of Substantially Continuous Service in the United States Merchant Marine" was issued pursuant to Public Law 87, 78th Cong. (57 Stat. 162) which gave reemployment rights to persons who served in the American Merchant Marine subsequent to May 1, 1940. Further, under the seal of the United States, President Truman issued a document suitable for framing, affirming the

[9] With practically any group of our World War II alumni, several will testify how they requested active duty in the Navy and were turned down for this reason. The pay scales of Merchant seafarers were established by the government at levels which together with bonuses for war zones were substantially higher than for comparable grades of the Armed Services on a day-by-day basis. Although this was considered necessary to maintain the Merchant Marine as a volunteer force, it has been unquestionably a cause of continuing friction between those serving in the Merchant Marine and those serving in the Armed Forces. Ironically, however, when fringe benefits such as leave, mustering out pay, hospitalization, disability retirement, PX and Commissary benefits and, particularly veterans' benefits are considered, the mariners' compensation was undoubtedly inferior to that of the Armed Forces personnel. See: *The Two-Ocean War*, S. Morison, p. 133; *Sea War*, F. Riesenberg, Jr., pp. 100-104.

"heartfelt thanks of the Nation" individually to those "who answered the call of your country and served in the Merchant Marine to bring about the total defeat of the enemy." Still further, a lapel device, about the same size but distinctive from, the lapel insignia given to those discharged from the Armed Services, was issued to Merchant Marine veterans.

b. Legislative History of Public Law 810, the Army and Air Force Vitalization and Retirement Equalizaton Act of 1948

The exclusionary language applied by the Army in *Fioto* is the last proviso in Section 302(a) of PL 810 which, as originally enacted, read as follows:

> "*Provided* further, that no person who was a member of a reserve component on or before August 15, 1945, shall be eligible for retirement benefits under this title unless he performed active Federal service during any portion of either of the two periods beginning April 6, 1917, and ending November 11, 1918, and beginning September 9, 1940, and ending December 31, 1946."

Although Appellant attempts to establish that the 80th Congress intentionally, by this proviso, created a perpetual bar to Reserve retirement pay to individuals who fall within its ambit, we agree with the lower three-judge court that, in fact, there is simply no persuasive evidence in the legislative history that Congress intended any pre-1940 service would create a perpetual bar to future benefits.

The problem faced by Appellant (to find Congressional intent in the last proviso of Section 302(a) to create a perpetual bar to reserve retirement pay) is that such proviso did not exist in a form which barred Fioto until minutes before the conclusion of the Sen-

ate hearings. Indeed, this proviso did not exist in *any* form until H.R. 2744 was considered by the Senate. Then, until amended on the last day of the Senate hearings, the exclusion applied only to individuals who were members of a reserve component *on* August 15, 1945. Not until page 77 in the last day, June 8, 1948, of the Senate hearings on HR 2744, were the words "or before" added so that the proviso related to individuals who were members of a reserve component *on or before* August 15, 1945. This occurrence is referred to and quoted in part on page 11 of the Brief for the Appellant. A more complete quotation is as follows:

> "Our next amendment is on page 23, line 11, member of a reserve component on, and insert the words 'or before.' This is to make certain that no one who drops out of the reserve to avoid service in the war is qualified under the bill. This is concurred in by the services and Reserves. Page 23, line 11, put in the words 'or before' in front of the date August 15, 1945.
>
> Senator Tydings: So it reads 'on or before August 15, 1945.' "I move the adoption of it."

Following this, the amendment was accepted as indicated by the text of the act as passed.

The context of earlier testimony on the same day, pages 69-71, leads to the impression that the Senators' prime interest was the costs of the retroactive features of H.R. 2744 and retroactive retirement credit was excluded by this proviso. In the context of the hearings, the page 77 amendment, as such, does not change this impression. The senators were concerned about crediting past Reserve service for those who had not served in World War I or World War II. This is

what was being discussed and the conclusion is reasonable that the exclusion or disqualification generating the last proviso of Section 302(a) as finally amended was intended to relate only to the retroactive credit. If the contrary were intended, it is far from clear. Neither the subsequent Senate Report nor the debates and remarks concerning the HR 2744 add any enlightenment.

It is further to be noted that the proviso does not use the word "retired pay" or "retirement" as otherwise found in Section 302(a); rather it refers to "retirement benefits under this title."

In Section 304, using the same words "retirement benefits," it is stated that for members who fail to conform to the prescribed standards and qualifications, they may be "retired without pay if qualified for such retirement" and such "action shall effect a termination of such person's right *to accrue retirement benefits under this title* but shall not affect any rights which have accrued prior to the time that such action shall have been taken with respect to such person." (Emphasis added) Most logically the "retirement benefits" being accrued were "points" and "Satisfactory Federal Service" authorized by the Act. Section 305, in contrast, is specific where it speaks of "eligibility of such persons to receive * * * any *retired pay* payable under this title." (Emphasis added)

The same language, "retirement benefits" is again to be found in Section 309 of PL 810 wherein it is stated that no person shall be ordered to active Federal service for the sole purpose of "qualifying for retirement benefits under this Title." Here too, the meaning

of "retirement benefits" is compatible with "points" or "Satisfactory Federal Service."

From the foregoing, it is difficult to avoid an interpretation that "retirement benefits" as employed in the original legislation were not intended to be synonymous with "retirement" or with "retired pay." Further, the use of "retirement benefits" throughout the act is consistent as meaning an earned fringe benefit which may eventually lead to retirement and retirement pay. If one asks, "What are the 'retirement benefits' of the position?" The answer is likely to comprise information of what it takes on a continuing basis to become eligible for retirement pay. Such an answer would evince a meaning coincident with "retirement benefits" as used throughout Title III of PL 810.

It is not suggested that this is the only meaning which may be ascribed generally to "retirement benefits." A person already retired might have an entirely different perspective of the meaning. The point is that the original text of the last proviso of Section 302(a) is not wholly "unambiguous" as asserted on page 10 of the Brief for the Appellant. Room for interpretations of the language *does* exist.

Still further, no great difficulty is perceived to construe the last proviso of Section 302(a) as retroactive only in barring *gratuitous* retirement credit rather than retroactive and prospective. The proviso, if construed to bar *earned* retirement credit, is obviously harsh; in effect it affirmatively blackballs a well-defined group by reason of a previous condition from ever qualifying for reserve retirement pay. It is thus restrictive and punitive in nature. It is, of course, a well recognized tenet of legislative interpretation that

penal statutes are to be construed strictly. See *Commission* v. *Acker*, 361 US 87 (1959).

In view of the foregoing, it will be appreciated that if only the original act is considered, constitutional issues need not be reached in *Fioto;* rather the matter is one of relatively straight forward statutory construction. Unfortunately, subsequent codification and amendment of the proviso as so codified complicates the issue.

c. Subsequent Legislative History

Statutes relating to the Armed Forces were revised and codified by the act of August 10, 1956, set forth in 70A, Statutes at Large. Section 49 of such act, 70A. Stat. 640, provides that it was the legislative purpose to reinstate, without substantive change, the law replaced by those Sections on the effective date of the act. Nevertheless, in the codification, it will be noted that language "retirement benefits" in the last provision of Section 302(a) was changed to "retired pay" in Section 1331(c) of Chapter 67 of Title 10, United States Code. In marked contrast, the exact same language "retirement benefits" became "computation of years of service" in codifying section 304 to become (in part) Section 1334(b), Title 10, United States Code. In recognition of the original intent of the last proviso of Section 302(a) of the 1948 Act, its codification in § 1331(c) undoubtedly should be construed to have the same effect.

Subsequently, the codification constituting Section 1331(c), Title 10, United States Code, 70A Stat, 102, however was amended by Public Law 85-704 of August 21, 1958, 72 Stat. 702, to make persons who performed

active duty (other than for training) after June 26, 1950, and before July 28, 1953, eligible for Reserve retired pay. It will be noted that the 1958 legislation restated subsection (c) in its entirety, incorporating, however, the amendment. The legislative history of this amendment may be found in Senate Report No. 2188, August 15, 1958, House Report No. 1984, June 25, 1958, and Hearings on Sundry Legislation affecting the naval and military establishment (HR 781) before the House Committee on Armed Services, 85th Congress, Second Session commencing at page 7896. Here, one Colonel Zehola explained that the proposed legislation related to persons who were employed in the Merchant Marine, in the Federal Bureau of Investigation, or as commercial airline pilots or in defense work and, because of the critical nature of their employment, were not ordered to active service in World War II, but who later performed active service in the Korean War.

Although there seemed to be some initial confusion as to the exact purpose of the proposed legislation by various committee members, in the end (mislead by the codification it is believed) it is clear beyond peradventure they interpreted Section 1331(c) (before Congress amended it) permanently to bar persons having Reserve service prior to August 16, 1945, who did not serve on active duty in World War I or II, from ever qualifying for reserve retired pay.

One member of the Committee, Mr. Van Zandt, expressed a special dislike for merchant marine veterans of World War II. Thus, on page 7904 of the House Hearings, he stated:

> "I see red every time I mention these people [merchant marine officers] because of my experience in the Pacific with them."

Albeit with misguidance, the 85th Congress may have created a perpetual bar to a well-defined group by reason of previous condition from qualification for reserve retirement pay through its amendment to Section 1331(c), Public Law 85-705.[10] If this be the result, not only are constitutional problems concerning the Fourteenth and Fifth Amendments involved but specters of a bill of attainder and/or an expost facto law are raised. The high water mark of this Court on bills of attainder is *U.S.* v. *Brown*, 381 US 437 (1965) wherein a law making it a crime for a communist to hold certain union positions was found (in a five to four decision) to be a bill of attainder. In a similar fashion, the 85th Congress may seen as blacklisting merchant marine veterans who were Reservists in World War II (unless they served in the Korean War) for eligibility for reserve retired pay and as a further measure, divesting them of retired benefits they might have accrued in the preceding ten years by Reserve participation. Of course, a statute need not be criminal to constitute a penal statute, particularly if such intent is indicated by the legislative history. See *Trop* v. *Dulles*, 356 US 86, 95 (1958).

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[10] On the other hand, Congress considered the H.R. 781 Amendment to be remedial, not punitive, and except for the addition of the Korean War veterans as an exemption to the exclusion, the language in 10 U.S.C. 1331(c) is unchanged by the Amendment. Hence, to construe the language more strictly by reason of an amendment intended to be beneficial would seem to pervert the *general* Congressional intent.

Further, the 1958 legislation in dispossessing merchant marine veterans who were also in the Naval Reserve during World War II of their earned reserve retirement credit had an effect similar to the Hiss act which was judicially determined to be ex post facto law. It will be recalled that the Hiss act prohibited payment of pensions to former employees who falsely testified in matters involving national security. *Hiss* v. *Hampton,* 338 F.Supp. 1141 (D.C. D.C. 1972).

d. Applicable Interpretations of the Fourteenth Amendment

To construe the last proviso of Section 302(a) as a perpetual bar against persons who come within its exclusionary terms against ever qualifying for reserve retirement pay is a clearly unconstitutional classification unless it serves a rational and valid governmental purpose. The provision creates several different classifications. First, it divides the reserve community into veterans of World Wars I and II and non-veterans of those wars. In addition, it distinguishes among such non-veterans with one classification being those who were in the reserve before August 16, 1945; another classification being those who first came in the reserve on or after August 16, 1945; and a third classification being those who first entered the Reserve on or after August 16, 1945, but had prior peacetime regular service.

The following chart may be helpful:

Classification	Retroactive retirement credit	Prospective retirement credit (Army construction)	Prospective retirement credit (District Court construction)
Veteran, WWI and/or II	Yes	Yes	Yes
Reservist before August 16, 1945, not WW I or II Veteran	No	No	Yes
Regular before August 16, 1945, not WW I or II Veteran	Yes	Yes	Yes
Reservist first after August 15, 1945 and before PL 810 effective date not WW I or II Veteran	Yes	Yes	Yes
Reservist first after Public Law 810 effective date	No	Yes	Yes

Appellant argues that the overriding purpose of Congress in enacting Public Law 810 was to preserve the Reserves as an effective secondary fighting force that would be available for immediate activation in time of military need and to achieve this end, it was necessary to make the Reserves attractive both to men with wartime experience and to a newer generation of men who had been too young to serve during World War II. Thus, appellant states that it was reasonable to exclude men who were not on active duty during World War II because they neither offered the youth nor the wartime experience Congress sought. Further, appellant, apparently understanding that there is little to differentiate in youth between one who first entered the Reserve August 15, 1945, and another who first

entered August 16, 1945, pointed out that Congress is entitled to employ broad statutory classifications which do not have to be made with mathematical nicety.

A second similar theory of rationality offered by appellant is that Congress was primarily interested in the prospective creation of a strong reserve force and it made it retroactive primarily as a gratuity for individuals who had served during World War I and World War II.

The fatal flaw in appellant's theories is that there is no legislative history to suggest that the last proviso, Section 302(a), PL 810, was for the purpose of discouraging older men (excluding World War I and II veterans) from serving in the Reserve. And, assuming *arguendo* this had been an intention of Congress in passing Public Law 810, § 1331(c) manifestly fails to constitute a rational legislative vehicle to this end. To the contrary, by giving gratitous retirement credit for Regular service, it actually encouraged *older* men—men who had been in Regulars in the Armed Forces before August 16, 1945, but who did not serve in World War I or II (and thus completed service before December 7, 1941)—to become Reservists. Still further, the proviso offers no discouragement to the much greater number of persons who were deferred from the draft and were thus in a purely civilian capacity in World War II in contrast to Reservists who were not called but were at all times subject to call.[11]

[11] For every Merchant Marine officer or cadet who was a Naval Reservist (50,000 is a *very* liberal estimate) there must have been at least 400 civilians deferred by the World War II draft. One deferred Reservist for every one thousand deferred civilians would be a more conservative (and probably accurate) estimate. See U.S. Bureau of Census, *Historical Statistics of the United States, Colonial Times to 1957*, p. 735.

Of interest, on page 70 of the Senate Hearings on HR 2744, *supra*, the Chairman gives the example of a person commencing his accrual of retirement points at age 25. In 1948 this was about the median or average age of our alumni who had served in World War II.

Had Congress desired to make age a limiting factor, it would have been easy so to have provided. For example, in Section 2107, Title 10, United States Code, for eligibility for the Senior ROTC program a member must be under 25 years of age on June 30 of the calendar year in which he becomes eligible under the Section for appointment as an ensign in the Navy or as a second lieutenant in the Army, Air Force or Marine Corps as the case may be. In Section 504, Title 10, United States code, original enlistments in the Regular Components of the Armed Forces are limited to able bodied persons who are not less than 17 years of age nor more than 35 years of age. Naval Academy midshipmen must be at least 17 and not have passed their 22nd birthday on July 1st of the year they enter the Academy. 10 USC 6958, 70A Stat. 431.

It is thus submitted that there is neither intrinsic nor extrinsic basis in § 1331(c) from its legislative history that it was rationally intended, or, in fact, would, prospectively encourage a more youthful reserve than would occur in its absence. It would seem equally arguable that the opposite result was intended.

If a perpetual exclusion were intended by the last proviso of Section 302(a), it is submitted that the motivation was simply what it seems to be on its face, that is a retribution against those who were in the reserve (or had been in the reserve) and did not serve

on active duty during World Wars I and II. And there is no redeeming rationale for this particular discrimination against such Reservists vis-a-vis the much greater number of civilians deferred from the draft during World War II. The first could have been called to active duty any time desired. The second would have to be drafted. The first had been trained. The second were without training. The first, if our alumni, had generally encountered the rigors and dangers of war. The second generally had not. Many in our group asked for active duty during World War II; those in the second group in all probability did not. Both were equally liable for service under the Selective Service Act of 1948 enacted June 24, 1948 62 Stat. 604. Both (later as Reservists) were preferred for recall by the Armed Forces Reserve Act of 1952. 66 Stat. 489. By no stretch of the imagination can such a scheme be called rational.

A similar scheme was held to be an unconstitutional classification in *Thompson* v. *Gallagher,* 489 F2d 443 (5 Cir. 1973) involving an ordinance which required employees of the city who were veterans with less than an honorable discharge to be discharged from employment. The Circuit Court in holding the classification to be unconstitutional noted that it divided employees of the city into veterans and nonveterans. In addition, it distinguished between veterans with honorable discharges and those with other than honorable discharges. The Court noted that numerous factors which have absolutely no relationship to one's ability to work as a custodian in a power plant may lead to a discharge which is other than honorable. Thus, the Court found that the general category was too broad to be called reasonable when it leads to an automatic dismissal

from any form of municipal employment. Subsequently, in *Rios* v. *Dillman,* 499 F.2d 329 (5th Cir. 1974) the same court noted on page 333, referring to *Thompson,* that a "statute that bars *all* employment has a substantially different effect from one that simply grants an advantage to some otherwise qualified for employment, . . ."

On page 20 of appellant's brief, it is stated that Congress made virtually the same distinction in § 1331(c) that this Court sustained as rational in *Johnson* v. *Robinson,* 415 US 361 (1974). In such case, Congress distinguished between military service and alternative civilian service for the purpose of eligibility for educational benefits from the Veterans Administration. The classification was upheld by this Court on the grounds that military veterans suffer far greater loss of personal freedom and become subject to the discipline and potential hazardous duty of the military establishment.

Although the rationale is hardly applicable to our alumni who, on the average, were subject to even more hazardous duty than members of the Armed Forces during World War II and who also were subject to military discipline, there is a vital distinction in that Robison was not necessarily *perpetually* barred from becoming eligible for Veterans Administration educational benefits. Had he so desired and his conscience permitted, the option was presumably open to him to enter on active duty whereby he could become eventually eligible for such benefits.

Appellant also cites *Richardson* v. *Belcher,* 404 U.S. 78 (1971), *Weinberger* v. *Salfi,* 422 U.S. 749 (1975) and *Marshall* v. *U.S.,* 414 U.S. 417 (1974).

Richardson involved a reduction of social security disability benefits where, added to State workmen's compensation, the total benefits exceeded 80% of the individual's average current earnings. This Court found a rational basis for this formula in a Congressional desire to avoid duplicate payments for disability and not to lead to the weakening of State programs. Without belaboring the matter, the case seems consistent with the lower court's decision in *Fioto* which approves *less* retired pay for the Reservist by not counting his pre 1940 service, but does not bar him *completely* from eligibility to receive retired pay.

In *Weinberger,* there was clear legislative history that Congress intended that a marriage be of at least nine months duration before the widow's social security benefits were authorized. This was to insure that the marriage was bona fide and not sham merely to gain elibility for such benefits. This Court found this duration-of-relationship test met constitutional standards inasmuch as it protected against the abuse and was justified by the difficulties of individual determinations. Again, the case is inapposite. The rationality which may be found in *Weinberger* simply does not exist in the instant case wherein Fioto had the prerequisite duration-of-relationship, 20 years, but would be disqualified by Appellant by reason of prior condition.

Marshall, on the other hand, seems more pertinent inasmuch as it involved a statute which *perpetually bars* the benefits of the Narcotic Addict Rehabilitation Act to individuals having two prior felony convictions. The rational purpose for this two-prior-felony exclusion was to keep hardened criminals out of the pro-

gram. But certainly, no fine sense of judgment is required to conclude that a perpetual exclusion of the benefits of the reserve retirement program because of honorable prior reserve service has no rational comparability to the perpetual exclusion of hardened criminals to a drug addict rehabilitation program.

The Brief for the Appellant dwells chiefly on the specific facts in *Fioto.* Appellant may therefore contend that with our wartime alumni, Congress had or could have had, other valid reasons for their exclusion from retired pay. This is anticipated to some extent on pages 15 and 16 of the Brief for the Appellant wherein it is argued that it was reasonable for Congress to consider past history in assessing the likelihood that such individuals would perform active duty during future wars if induced to remain in the Reserve by the promise of retired pay.

Thus, appellant might allege that inasmuch as many Naval Reservists in the Merchant Marine were not placed on active duty in World War II, there is no purpose served by an incentive to retain them in the Reserve. Another argument might be that inasmuch as the Merchant Marine Act, 1936 (46 USC 1132(g)), requires, or at least strongly encourages, eligible deck and engineering officers to be in the Naval Reserve, another incentive to the same end serves no useful purpose. The fallacy of both rationales is that it is not "merchant marine officers," as such, who are barred and no rational basis exists to differentiate on these grounds between our World War II alumni and those entering the program subsequently who also became members of the Naval Reserve, but who are not barred from qualifying for reserve retired pay. They too, are required administratively and by the Merchant Marine Act, 1936, to be members of the Naval Reserve.

Further, of course, if the occupation of the Reservist was the reason for the bar, then the bar should be eliminated with a change in the Reservist's occupation. Moreover, the continuous screening of the Ready Reserve to eliminate those having critical civilian skills is required by another statutory provision, 10 USC 271, 69 Stat. 599, 72 Stat. 1438.

Appellant may charge that the World War II Merchant Marine Reservists who were all volunteers, who fought their ships so long as they floated to the last round of ammunition and through waters considered too dangerous for the Navy's mightiest warships, and whose killed-in-action rate exceeded that of any Armed Force, needed no special incentives to serve again when their courage and fortitude was called for. Although this conclusion may hold more than a germ of truth, many other Americans at the same time continuously risked their lives to defeat the enemy; they can be similarly charged. Such, dedication, it is submitted, defies rational classification.

On objective analysis, we can only regard the last proviso of Section 302(a), as appellant construes it, as an undesirable, unfair and unearned discrimination against many of our alumni. Although we do not believe that the 80th Congress so intended, the end result to our alumni adversely affected by the legislation seems to place them in the same company as felons and in a caste below communists.

It is submitted that the issue under the Fourteenth Amendment as to whether an unconstitutional classification exists by reason of the perpetual bar of § 1331 (c) is not close; it is totally without a rational basis having any connection to the purpose of the act involved.

e. U.S. District Court Jurisdiction Over Retroactive Retirement Pay

So far, few, if any, of our alumni affected have reached age 60 whereby they might qualify for *retroactive* retirement pay and therefore the contentions submitted by appellant on pages 21-25 of his brief are not of direct interest. However, the issue is probably more technical than real inasmuch as this Court's affirmance of the three-judge court decision below for Fioto or otherwise finding § 1331(c) to be an unconstitutional classification will undoubtedly be recognized by all agencies of the Federal government including the departments of the various Armed Services and the General Accounting Office (31 USC 71) in like cases. Further the jurisdiction of the Court of Claims under 28 USC 1491 to award back retirement pay arising under an act of Congress is longstanding.

CONCLUSION

The judgment of the District Court should be affirmed at least insofar as it has determined Section 1331(c), Title 10, United States Code, as administered by appellant, to be an unconstitutional classification in violation of the Fourteenth and Fifth Amendments.

Respectfully submitted,

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